81-131

IN THE

Supreme Court Of The United States

No. ____

OCTOBER TERM

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

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I.

QUESTIONS PRESENTED

A. Does the Arkansas usury law deprive appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

B. Is the Arkansas usury law an undue burden on interstate commerce in violation of the commerce clause of the Constitution of the United States?

C. Does the Arkansas usury law deny appellants equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States?

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JURISDICTIONAL STATEMENT

IV.

OPINIONS BELOW

Quinn-Moore, et al v. Lambert, et al, 272 Ark. 324, 614 S.W.2d 230 (1981), affirming judgment of Pulaski Circuit

Court based upon Memorandum Opinion of Hon. Bruce T. Bullion, Special Circuit Judge dated March 6, 1980.

V.

JURISDICTIONAL GROUNDS

This is an appeal from a decision of the Supreme Court of Arkansas dated April 20, 1981. Notice of appeal to this Court was filed with the Supreme Court of Arkansas on June 9, 1981. Jurisdiction for appeal to this Court is conferred by 28 U.S.C. §1257 (2). Appellants challenge the validity of the Arkansas usury law contained in Article 19, Section 13 of the 1874 Constitution of Arkansas on the grounds that the state law is repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and repugnant to the Commerce Clause of the Constitution of the United States. The decision of the Arkansas Supreme Court appealed from was in favor of the validity of the state law.

VI.

CONSTITUTIONAL PROVISIONS INVOLVED

The challenged Arkansas usury law is set forth in the 1874 Constitution of Arkansas, Article 19 Section 13, which provides as follows:

> All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum.

The challenge to the Arkansas usury law is based upon the following provisions of the Constitution of the United States, as amended:

(1) Section 1 of the Fourteenth Amendment to the United States Constitution:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) The Commerce Clause of the United States Constitution, Article I, Section 8 (3):

> the Congress shall have power. . . to regulate commerce . . . among the several states . . . .

VII.

STATEMENT OF THE CASE

On November 1, 1978 the Bank Commissioner of the State of Arkansas directed the American State Bank of Charleston, Arkansas to cease making any further advances pursuant to a loan agreement in which it was participating with the First National Bank in Little Rock. The borrower was Quinn-Moore, a partnership operating a Texaco truckstop in the Little Rock area. The loan was in the amount of $385,000.00 for the enlargement of the restaurant at the truckstop. Partners and guarantors were Luke and Mildred Quinn and Ed and Carolyn Moore. The American State Bank and the First National Bank in Little Rock had already advanced $10,000.00 on the loan.

The basis given by the Bank Commissioner for his action was the Arkansas usury law contained in Article 19, Section 13 of the 1874 Constitution of Arkansas which provides that all contracts calling for a greater rate of interest than 10% per annum shall be void, both as to principal and interest. If the law were valid, the result would be that the banks would be making advances that the borrower would not be required to repay, which would be an unsound banking practice.

The two lending banks, Quinn-Moore and its partners immediately filed suit seeking declaratory judgment against the Bank Commissioner and his legal adviser, the Attorney General of the State of Arkansas, holding that the Arkansas usury law was an unconstitutional deprivation of the lenders' and the borrowers' liberty and property in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States and a denial of their right to equal protection under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Many intervenors promptly intervened on the side of the two banks and the borrowers. These intervenors included organizations representing both lenders and borrowers. Included as intervenors were the Arkansas State Chamber of Commerce, the Arkansas Bankers Association, the Arkansas Savings & Loan League, the Arkansas Mortgage Bankers Association, the Arkansas Credit Union League, the Arkansas Automobile Dealers Association, the North Pulaski Board of Realtors, six other financial institutions and three real estate and construction firms.

Interventions were also promptly filed in support of the Bank Commissioner and the Attorney General by the Arkansas State AFL-CIO, a consumer organization known as ACORN, Arkansas Consumer Research, Inc., and Elizabeth McAllester, a client of the Legal Aid Bureau of Central Arkansas.

Following a trial in the fall of 1979 lasting five weeks with testimony from 130 witnesses and numerous exhibits, all occupying over 3600 pages of transcript, the Pulaski Circuit Court, in March, 1980, held that the manner and level of regulation of interest rates was a political question, not subject to judicial review. He therefore dismissed the complaint. The Supreme Court of Arkansas affirmed on the same basis on April 20, 1981.

This appeal was filed by the original plaintiffs and all intervenors supporting them on the grounds that the level and manner of regulation of interest rates is nothing more than the fixing of the price for the use of money, governed by the same principles applicable to the fixing of prices by government generally. Under those principles, it is the position of appellants that the limit of 10% for the borrowing and lending of money set in Arkansas in 1874 is totally arbitrary and a denial of their rights under the Constitution of the United States.

State usury laws in general are not challenged, only the Arkansas usury law, the most restrictive in the nation. Other states have a wide variety of usury laws based upon rational efforts to relate the interest limit to such factors as market indicators and type of loan. None set a single rate in a constitution.

Appellants believe that the primary issue for this Court to determine is whether the well-established body of law requiring government regulation of prices and rates to have a rational basis also applies to government regulation of the price for the use of money (usury laws). Neither the trial court, Arkansas Supreme Court nor the Attorney General took the position that the Arkansas usury law could withstand this test of rationality, but rather in effect took the position that whether the rate was 1%, 10% or 20% was a political question, not subject to judicial review.

The testimony of appellants was directed at establishing the lack of any rational relationship of the 10% usury law to the purpose for which the law was enacted, namely to prevent "excessive" charges. The general substance of this testimony was that during the recurring cycles of higher interest rates such as in 1969, 1973-75, and beginning in 1977 to the date of the trial in September, 1979 (continuing to this date) when interest rates nationally for particular types of loans exceeds or even approaches 10%, thousands of Arkansans are denied millions of dollars of loans they need and desire. Money flows in great quantities out of the State to the market price available elsewhere and out-of-state money ceases flowing into the State. Much testimony was presented showing that this severe disruption of the interstate flow of funds had no rational basis, but was caused by the arbitrary, permanent selection of a number—10—for all times for all types of loans.

The evidence ranged from testimony from individual borrowers and lenders concerning their inability to borrow or lend for a particular purpose to a general summary on a state and national basis presented by expert witnesses.

Luke Quinn testified that he, his wife, Mildred, his partner Ed Moore and his wife, Carolyn, had been operating a very busy fifty-seat restaurant at their truckstop, but that the demand was so great the restaurant was extremely overcrowded, and that if expansion was not made they were in danger of losing their business to competing restaurants, to their detriment and the detriment of their employees. He tried in vain from several banks to obtain a loan, but at the time in 1978 he was seeking the loan, the prime interest rate in Little Rock was 10%, and this type of construction loan, secured only by a second mortgage, was carrying a rate, nationally, of two points above prime, or 12%. He finally convinced the First National Bank in Little Rock and the American State Bank in Charleston to agree to lend Quinn-Moore the $385,000.00 at 12%.

Both banks and the borrowers realized that the Bank Commissioner would probably stop advances under the loan on the grounds that the Arkansas usury law would void the loan, but the parties were willing to litigate the matter in order to have the law stricken as a violation of their constitutional rights so that the loan could go forward.

Luke Quinn testified that he was able to pay the 12% rate and still make a profit, according to his projections. The bank officers testified that they were willing to make the loan at 12% but at no lesser rate, due to the high cost of their money at that time and the market price elsewhere.

The Bank Commissioner, although his office had felt obliged to direct no further advances to be made because of the Arkansas usury law, testified candidly that he could find no rational basis for the law and that it was operating to the detriment of both lenders and borrowers. He stated that there had been an extensive denial of credit in the State due to the 10% limit, in the millions of dollars to thousands of persons. (R. 385) He estimated that from one hundred million to one hundred fifty million dollars had left the Little Rock area alone going out of State for a higher rate. (R. 388)

He pointed out the obvious, that the rates banks were having to pay on the certificates of deposit, exceeding 10%, made absolutely unprofitable loans at 10%. (R. 400) He concluded that the 10% figure was not related to the figure needed to make a profit in a bank today, that it was just a figure appearing in the Constitution with no relationship whatsoever to the cost of doing business. He testified that there were reasonable methods of regulating excessive charges for the use of money, but the Arkansas law was not rational.

A member of the staff of the anti-trust division of the Attorney General's office revealed that the anti-trust division had conducted an investigation to determine if there had been collusion among mortgage lenders to restrain making mortgage loans in Arkansas during 1978. He concluded that the restriction in mortgage lending was not due to conspiracy, but to factors such as the inability of many lenders to obtain funds in the secondary mortgage market, a factor that was exacerbated by the fact that, nationally, mortgage rates exceeded the 10% maximum interest rate allowed under Arkansas law. (R. X78)

Hon. Frank D. White, Governor of Arkansas, who was then president of Capital Savings & Loan Association in Little Rock, testified that due to the inability to attract funds because of the 10% limit and the availability of better yields elsewhere, his institution had not committed to a single commercial loan during 1979. His institution was maintaining a very small activity in single family residential and home improvement loans.

Governor White pointed out that during the first four days the money market certificate rate first exceeded 10% his institution failed to retain $275,000.00 in deposits. (R. 1664) He stated that loan demand was strong and that he would be able to make loans at the national market rate of 11¼ to 11½ if permitted to do so by Arkansas law. These loans could then be sold into the national market. (R. 1678)

Capital's profits were down 75% during the third quarter of 1979 due to the curtailment of lending. (R. 1684) As of August 31, 1979 Capital had borrowed from the Federal Home Loan Bank at a rate of 9.85% and when the loan had to be renewed shortly the rate would be as high as 12¼%. (R. 1692)

Governor White concluded that the Arkansas 10% usury law had no rational basis in today's national money market. (R. 1654)

Mr. Raymond F. Widmer, Senior Vice President, Treasurer, and Secretary of the Federal Home Loan Bank in Little Rock testified that his bank was charging 10.10% to 12.25% to savings and loans for loans made to them. As of the time of his testimony the national rate for residential mortgage loans was 11.639. Arkansas savings and loan institutions could not, therefore, sell a 10% loan in the national market without taking a substantial discount at a capital loss. He considered that the states in the ninth district did not have as strict usury laws as Arkansas and that their usury laws were related to the national market.

Dr. George Lemaistre, Chairman of the Board of the Federal Deposit Insurance Corporation in 1977 and 1978, member of the Board since 1973, now Professor at the University of Alabama, testified that the purpose of usury laws was to prevent excessive charges for the use of money being imposed by lenders upon unsophisticated, unwary borrowers; that in his opinion the Arkansas usury law was in a different category and was simply an arbitrary figure that did not relate to the market price of money or to what money cost to relend.

Irvin H. Sprague, chairman, Federal Deposit Insurance Corporation, testified through his deputy, Alan R. Miller, repeating testimony he had given before Congress in support of one of the federal laws temporarily preempting state usury laws. He pointed out that it does not take much

to see that you cannot lend money for 10% or less when it costs you 10% or more to buy it. As a result, he testified there was a situation in the State in which major lenders cannot lend and major borrowers cannot borrow, and there was major trouble. He testified that those like himself in the bank supervisory sector supported and recommended enactment of legislation providing interim relief from a very difficult credit situation in Arkansas. (R. X34)

Peter McNeish, Deputy Association Administrator for Finance and Investment, United States Small Business Administration, testified that the most severe and pressing problem regarding interest limitations was in the State of Arkansas where the State Constitution prohibits all loans at rates in excess of 10%. He states that the SBA loan officers in Arkansas indicated that in the face of strong demands for loans, the flow of financing to small business had practically stopped.

Gene Lovati and R. Alton Gilbert, Research Department, Federal Reserve Bank of St. Louis testified that their research revealed that when national average interest rates rose above the usury ceiling set by states, many individuals in that state cannot find lenders who will finance their home purchases. They pointed out that where floating usury rates were enacted, the evidence showed that the average mortgage interest rates did not go to the maximum but approximately equalled the national average set by the market. (R. X56)

John J. Deisher, Regional Vice President for the Southwestern Region of the Federal National Mortgage Association, testified showing dramatically the decline in the number of mortgages purchased by FNMA in Arkansas due to the rising interest rates.

Dr. Thomas R. Harter, Chief Economist and Vice President of Economics, Mortgage Bankers Association of

America testified that in a national mortgage market, if a local lender has to purchase money at rates set in the national market, he could not be then forced to sell it at artifically low rates locally. (R. X511) He pointed out the importance in today's home finance market of the lenders being able to resell their mortgages into the national market in order to raise sufficient funds.

In addition, testimony was presented from officers of nine banks of various sizes scattered across the State of Arkansas, all of whom confirmed, with specific evidence, the drastic curtailment of loan activity in their banks due to the inability to loan money at 10% when money was costing 10% or more for the banks to buy. The total volume of loans denied to otherwise worthy applicants was in the millions for these banks alone, and the officers testified that the condition was general statewide.

Testimony was presented from officers of 35 savings and loan institutions of various sizes scattered throughout Arkansas, again giving the severe impact of the Arkansas usury law upon their lending activities, to the detriment of their customers.

Testimony was presented by mortgage bankers, individuals who had been denied loans, real estate agents and small businessmen, all attesting to the drastic denial of loans in Arkansas due to the 10% limit. Those witnesses could find no rational basis for such a denial of loans.

Testimony was presented from three personal finance companies confirming that their companies were no longer operating in Arkansas due the 10% limit and that they did not know of any such companies which were. Testimony was presented from two national leasing companies to the same effect. Twenty-nine national insurance companies presented testimony that they were making no loans in the State of Arkansas and had not for many months due to the availability of yields in excess of 10% elsewhere in the

nation. They could find no rational basis for such an interest limit.

Finally, expert opinion evidence was presented from Dr. Charles Venus, economic consultant, Little Rock, Dr. Gene Lynch, Professor of Finance in the College of Business, University of Arkansas and Dr. John Dominick, Chair of Banking, University of Arkansas, relating in general terms the impact on the financial institutions, their customers and the economy of Arkansas due to the wholesale denial of loans that had been described by the other witnesses.

The Attorney General called only three witnesses, Dr. Henry B. Schecheter, economist for the AFL-CIO, J. Bill Becker, President of the Arkansas State AFL-CIO and Dr. Leonard A. White, Professor of Economics, College of Business, University of Arkansas. Dr. Schecheter conceded that impact upon loan activity in Arkansas due the 10% limit but gave his opinion that the adverse impact had other favorable aspects by not burdening Arkansans with higher interest rates during period following a high interest rate cycle. Dr. White testified that, based on a set of documents he reviewed, he could not demonstrate overall an adverse impact on the Arkansas economy, although he admitted loans were being denied and there were areas in which difficulties were being experienced. Mr. Becker's testimony primarily related to the political aspects of the usury issue.

No testimony was presented by any witness attempting to justify the number 10 as being a number rationally related to the market place, the cost of money, or to any other rational standard. No testimony was presented contrary to that outlined above to the effect that thousands of persons were being denied loans, totaling millions of dollars, due to the Arkansas 10% interest limit, that money was flowing out of the State of Arkansas that otherwise would stay in the State, that money was not entering the State that otherwise would enter the State, and that this

severe disruption of the flow the money did adversely affect all those persons who sought credit and were denied credit.

The trial court and the Arkansas Supreme Court held that this evidence of arbitrary government regulation of price should be presented to the voters, not a court for judicial review. Hence this appeal, seeking judicial protection of the alleged constitutional right to be free from destructive, arbitrary government regulation.

VIII.

THE QUESTIONS ARE SUBSTANTIAL

A. INTRODUCTION

The questions presented by this appeal are without doubt so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. In fact, appellants believe that not only are the questions presented substantial, but the position of the Attorney General is so insubstantial that this Court should reverse the judgment below based upon this jurisdictional statement. At the very least, however, should the Court not do so, briefs on the merits and oral arguments are a necessity. The holding of the trial court and the Arkansas Supreme Court that well established principles of government price regulation have no application to regulating the price for the use of money, has no logic in support of it. The decision can only be explained by the fact that the issue of usury is emotionally charged and the precise questions have apparently never been presented to a court for review, probably because the Arkansas usury law is the most restrictive in the nation, and economic conditions over the past ten years have finally dictated that the law be challenged. The lack of a precise precedent has never been an obstacle to this Court whose function is to apply well-settled principles to new fact situations as they

arise, unhampered by the natural reluctance of some lower courts to tread in new areas.

The questions are also substantial because of the tremendous economic impact the usury law of Arkansas imposes on thousands of its citizens. Comparing the economic impact on the number of people and the millions of dollars involved against the impact of other unconstitutional laws reviewed by this Court, the tremendous importance of the questions presented can be recognized. For example, this Court recently declared unconstitutional Iowa's statute preventing the use of sixty-five foot double trailer trucks within its borders and allowing only the use of fifty-five feet single trailer trucks and sixty foot double trailer trucks. *Kassel v. Consolidated Freightways Corporation of Deleware*, ____ U.S. ____, 1015 S.Ct., 67 L.Ed. 580 (March 24, 1981) Certainly there was a serious economic impact upon truckers, but compare that impact with the denial of thousands of loans in the amount of millions of dollars to Arkansans over the past few years and the substantial nature of the question must be apparent.

The beneficial effects that would flow from a decision freeing Arkansans from the shackles of the 1874 10% limit and allowing the enactment of reasonable laws, rationally designed to prevent excessive charges for the use of money are obvious. Were it not for the temporary federal preemption of Arkansas usury law for certain types of loans, Arkansas would clearly be an economic disaster area.

The Arkansas usury law is the only law in the nation which has a single limit applying to all loans for all type of people, that can only be changed by constitutional amendment. The laws of most states provide for different rates for regulated lenders for small consumer loans, exemptions for such as corporate loans, FHA and VA loans. Other laws are tied to market indicators such as the present federal law.

The primary legal question for the consideration of this Court is whether to apply the well-settled principles preventing governments from setting maximum prices arbitrarily low to a government's setting of the price for the use of money. This is the gap that neither the trial court nor the Arkansas Supreme Court could bridge. Once this Court reaches what seems to appellants to be the only rational result that can be reached on that issue, the final decision should be very plain. The Attorney General did not seriously attempt, nor did trial court or the Supreme Court, to defend the rationality of the Arkansas usury law. Rather, all relied upon the proposition that, contrasted with the fixing of prices for other goods and services, the fixing of the price for the use of money is a political question to be resolved at the polls, whether that rate set be 1%, 10%, 20%, rational or irrational, confiscatory or designed to allow a reasonable mark-up over cost.

At the outset, appellants would recognize that interest rates, like gasoline prices and many other prices are too high today. But the question is, if those prices are to be regulated, whether the regulation must be rational. For one state to attempt to hold interest rates to 10%, when market prices are higher consistently around the nation, is not to regulate the price charged for the use of money but to forbid lending and borrowing altogether. Certainly usury laws have a place in society in order to prevent unscrupulous lenders from taking advantage of unwary borrowers and charging more than market conditions or cost dictate. But lending and borrowing are too vital for the economic survival of citizens of a state to be regulated in a destructive, arbitrary manner.

The Arkansas usury law at 10% is no more rational than would be the effort of the State of Arkansas to reduce the price of gasoline by placing a forty cent maximum price in today's market. The Attorney General's own witness, Dr. Henry Schecheter, admitted that such an attempted

regulation of a fast moving interstate product would be totally futile. He testified:

> Q. Would it not be an obvious fact that if you put a forty cent price on gasoline tomorrow there would not be any in Arkansas by the end of the week?
>
> A. Of course. (R. 2282)

Because the Arkansas usury law is totally arbitrary, not designed to relate to the market price of money, the cost of buying money to relend or to any other standard, appellants believe the following discussion will demonstrate unquestionably that the Arkansas usury law deprives appellants of their liberty and property without due process of law, is an undue burden on interstate commerce and denies them the equal protection of the law.

B. THE ARKANSAS USURY LAW DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has consistently held since the landmark cases of *Stone v. Farmers Loan and Trust Company*, 116 U.S. 307 (1886) and *Smyth v. Ames*, 169 U.S. 466 (1898) that when a government seeks to regulate prices it must do so by a rational standard, and the manner and level of that regulation will be subject to strict judicial review. In *Smyth v. Ames*, Chief Justice Harlan stated the principle applicable to this case as follows:

> While rates for the transportation of persons and property within limits of a state are primarily for its determination, the question whether they are so

> unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry." 169 U.S. 466 at 526.

Following these decisions, both this Court, Circuit Courts of Appeal, United States District Courts, and the highest courts of the state; including Arkansas, have repeatedly reviewed judicially rates and prices set by governments and repeatedly found there was a denial of due process of law by a rate or price fixed by government arbitrarily and unreasonably low. Representative cases are: *Simpson v. Shepard*, 230 U.S. 352 (1913), *Northern Pacific Railway Company v. North Dakota*, 236 U.S. 585 (1915), *Norfolk and Western Railway Company v. Conley*, 236 U.S. 605 (1915), *Denver v. Denver Union Water Company*, 246 U.S. 178 (1918), *Detroit United Railway Company v. Detroit*, 248 U.S. 428 (1919), *United States v. L. Cohen Grocery Company*, 255 U.S. 581 (1921), *Newton v. Consolidated Gas Company*, 258 U.S. 165 (1922), *Missouri Ex Rel Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923), *A.B Small Company v. American Sugar Refining Company*, 267 U.S. 233 (1925), *Ohio Utilities Company v. Public Utilities Commission of Ohio*, 267 U.S. 359 (1925), *Northern Pacific Railway Company v. Department of Public Works of Washington*, 268 U.S. 39 (1925), *Ottinger v. Consolidated Gas Company of New York*, 272 U.S. 576 (1926), *Chicago, Milwaukee and St. Paul Railway Company v. Public Utilities Commission of Idaho*, 274 U.S. 344 (1927), *West v. United Railways and Electric Company*, 280 U.S. 234 (1930), *Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio and City of Columbus*, 292

U.S. 398 (1934), *West v. Chesapeake and Potamac Telephone Company*, 295 U.S. 622 (1953), *Gold v. Lorenzo*, 425 F.2d 949 (2nd Cir. 1979), *Forest Oil Corporation v. Federal Power Commission*, 263 F.2d 622 (5th Cir. 1959), *Mora v. Majas*, 223 F.2d 814 (1st Cir. 1955), *New York Telephone Company v. Pendergast*, 36 F.2d 54 (S.D.N.Y. 1929), *Southwestern Bell Telephone Company v. Railroad Commission of South Carolina*, 5 F.2d 77 (E.D.S.C. 1925), *Van West Gaslight Company v. Public Utilities Commission of Ohio*, 299 F. 670 (S.D. Ohio 1924), *Alton Water Company v. Illinois Commerce Commission*, 279 F. 869 (S.D. Ill. 1922), *Karrick v. Cantrill*, 277 F. 578 (Ct. App. D.C. 1922), *Southern Bell Telephone and Telegraph Company v. Tennessee Public Service Commission*, 202 Tenn. 465, 304 S.W.2d 640 (1957), *General Telephone Company v. Wellington*, 156 Tex. 238, 294 S.W.2d 385 (1956), *Culberson v. Ashford*, 118 Tex. 491, 18 S.W.2d 585 (1929), *Gulf Power Company v. Bevis*, 289 So.2d 401 (Fla. 1974), *Keystone Water Company, Inc. v. Bevis*, 278 So.2d 606 (Fla., 1973), *Westwood Lake, Inc. v. Dade County*, 264 So.2d 7 (Fla. 1972), *Village of Virginia Gardens v. Haven Water Company*, 91 So.2d 181 (Fla. 1956), *St. Louis-San Francisco Railway Company v. Oklahoma*, 478 P.2d 354 (Okla., 1970), *Mountain States Telephone and Telegraph Company v. New Mexico*, 89 Ariz. 408, 563 P.2d 588 (1977), *Berger v. State Board of Hairdressing*, 118 R.I. 55, 371 A.2d 1053 (1977), *New England Telephone and Telegraph Company v. Department of Public Utilities*, 327 Mass. 81, 97 N.E.2d 509 (1950), *Arkansas Public Service Commission v. Yelcot Telephone Company*, 266 Ark. 265, 585 S.W.2d 362 (1979), *Arkansas Public Service Commission v. Continental Telephone Company of Arkansas*, 262 Ark. 821, 561 S.W.2d 645 (1978), *Union Carbide and Carbon Corporation v. White River Distributors, Inc.*, 224 Ark. 558, 275 S.W.2d 455 (1965), *Alsup v. State*, 178 Ark. 170, 10 S.W.2d 9 (1928).

The holding of the above cases that government regulation of prices must be subject to judicial review for reasonableness is summarized in the following statement in 16A, C.J.S. "Constitutional Law" §690, p. 1124:

> Governmental regulation of charges, rates, or prices is lawful and not offensive to constitutional requirements of due process of law *if it is substantially related to a legitimate end sought to be attained, and the test of the validity of such regulation is its reasonableness.* (Emphasis added)

The well established principle, therefore, that prices and rates set by governments must be reasonable and the reasonableness is to be reviewed judicially cannot be challenged.

Despite this solid body of law, the Arkansas Supreme Court and the trial court, could not bring themselves to declare that the emotionally charged issueof usury was ncthing more than the fixing of the price of the use of money, governed by the same principles as in the cases set forth above.

The Arkansas Supreme Court instead held that the question was political, not subject to judicial review. Following is the conclusion of the Arkansas Supreme Court:

> Ultimately the question in this case narrows down not to an issue of constitutional law but one of public policy: What should be the maximum interest rate in Arkansas? . . . We are not called upon, however, to pass judgment upon the wisdom of our usury law. If it is to be changed it must be done by popular vote, not by judicial decision. (Appendix, p. ____)

Although the Arkansas Supreme Court did not acknowledge that it was reverting to what was formerly the law of this Court over 100 years ago, that is exactly what

the Arkansas Supreme Court did. In 1877, Chief Justice Waite of this Court wrote the opinion in *Munn v. People of Illinois*, 94 U.S. 113, (1877) in which he announced the principle, now overruled by all the cases cited above, that the regulation of price was a political question to be resolved at the polls, not in the Courts. Chief Justice Waite stated:

> We know that this (the power to limit the rate of charge for services) is a power which may be abused; but that is not argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. (94 U.S 113 at 134)

The above quote from the Arkansas Supreme Court in this case is almost a carbon copy of the now overruled opinion of Chief Justice Waite in 1877. By 1886, Chief Justice Waite, himself, changed his own opinion when he wrote the decision in *Stone v. Farmers Loan and Trust Company* (the Railroad Commission Cases) 116 U.S. 307 (1886), cited above, which became the basis of the landmark decision in *Smyth v. Ames*, 169 U.S. 466 (1898), cited above. Thus, when the Constitution of 1874 was written, the question was a political one, but not since 1886 has price regulation been a political question to be reviewed by popular vote, rather than by judicial decision.

The Attorney General's own witnesses frankly conceded that usury laws were nothing more than a regulation for the price for the use of money. Dr. Henry Schecheter, an economist for the AFL-CIO, testified:

> Q. First of all could you tell me what your definition of interest is?
>
> A. Interest is a payment for the use of money.

> Q. Yes, sir. A payment for the use of money. Would it be fair to say that it is a price for the use of money?
>
> A. It could be defined as the price; I have no objection to that view. Another way might be to call it rent for money?
>
> A. Some people use that expression. (R. 2237)

Dr. Schecheter's testimony is consistent with generally recognized principles, as stated in 45 Am.Jur.2d, "Interest and Usury," Section 1:

> Interest is the compensation allowed by law, or fixed by the parties, for the use, detention, or forebearance of money or its equivalent.

Once this Court determines that usury laws are subject to judicial review for reasonableness, the Arkansas usury law falls automatically. The record established conclusively, what this Court could judicially notice, that the Arkansas usury law limit of 10% set in 1874 for all types of loans for all kinds for all types of lenders for all types of borrowers cannot conceivably be rationally related to present day conditions.

The case is, thus, very similar in nature to another case, *Newton v. Consolidated Gas Co.*, 258 U.S. 165 (1922), successfully challenging a price-fixing law, in which Justice McReynolds of this Court commented as follows:

> A master, appointed in May, 1919, heard testimony from day to day for eight months, —about 20,000 printed pages . . . (258 U.S. 165 at 171)
>
> The fundamental question presented for determination was whether the 80 cent rate had been confiscatory

> under conditions existing during 1918 and 1919 . . . . The answer required little more than an appreciation of facts not very difficult to ascertain.
>
> . . .
>
> We are, of course, aware of the enormous increase in cost of labor and materials since this Court declared that appellee might possibly earn six per centum under the 80-cent rate. In view of all these things only very cogent reasons would justify complete reversal of the challenged decree. The points relied upon by appellants in No. 257, and their supporting arguments, have been considered, and we think no such reasons are shown. (258 U.S. 165 at 174)

The Arkansas 1874 usury law can only be effective in accomplishing its purpose by accident, when for a given type of loan in a given time of economic upswing or downswing the figure of 10 happens to be a reasonable regulation for a particular type of loan. Like a clock stopped twice a day, the Arkansas usury law could be the right number for an isolated loan at a particular time in history, but not for all loans for all times for all lenders for all borrowers.

Due process of law commands rational regulation of such a vital economic activity. The 1874 Arkansas usury law is irrational and, therefore, void as a deprivation of liberty and property without due process of law.

C. THE ARKANSAS USURY LAW IS AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The trial court and the Arkansas Supreme Court refused also to declare the Arkansas usury law an undue burden on interstate commerce, primarily because there was no precedent either way on the question. Again, by applying the well-settled principles announced by this Court regarding what constitutes an undue burden on interstate commerce, the Arkansas usury law must fail.

No witness and no attorney attempted to argue that the flow of money is not extensively involved in interstate commerce, and the only question is whether or not the regulation of that interstate commerce by the State of Arkansas is an undue burden on such commerce.

Appellants believe that, with respect to the regulation of prices and rates involved in interstate commerce, the same principles apply as set forth in the preceding section of this jurisdictional statement, namely states may regulate rates affecting interstate commerce, where such rates are not specifically preempted by Congress, but all such regulations by the state must be subject to judicial review for reasonableness.

A careful review of the decisions of this Court indicates to Appellants that in the case of a price control law, there is no real difference beween the test of an unreasonable rate under the Due Process Clause and an unreasonable rate under the Commerce Clause. As indicated by the decisions of this Court under the Due Process Clause portion of this statement in the railroad rate cases and the other cases in which interstate commerce was involved, this Court seemed to indicate a preference for disposing of the cases where an unreasonable price was set on the grounds that the price was a deprivation of liberty and property without due process of law.

However, in the early leading case of *Simpson v. Shephard*, 230 U.S. 352 (1913) (The Minnesota Rate Cases)

this Court made very clear that, under the Commerce Clause, the only authority given to the states to regulate rates for intrastate traffic of interstate carriers was the authority to set *reasonable* rates. Thus if a state set an unreasonable rate, it would also be in violation of the authority that it had under the Commerce Clause. In the Minnesota Rate Cases, however, the Court placed its holding on the grounds of a denial of due process.

The following portions of the opinion by Justice Charles Evans Hughes in the Minnesota Rate Cases makes clear that when the states are permitted to regulate aspects of interstate commerce by setting rates, the rates must be reasonable:

> It thus clearly appears that, under the established principles governing state action, the state of Minnesota did not transend the limits of its authority in prescribing the rates here involved, *assuming them to be reasonable intrastate rates.* (230 U.S. 352 at 432).

In view of the apparently identical test applied both under the Commerce Clause and the Due Process Clause in the case of states' price fixing that affects interstate commerce, appellants believe that all of the grounds for declaring the Arkansas price-fixing law unconstitutional under the Due Process Clause, discussed in the preceding section of this statement apply with equal force to make the law unconstitutional under the Commerce Clause.

In areas other than price fixing by states, this Court has formulated a "balancing" test in determining whether a state has imposed an undue burden on interstate commerce. In view of the more specifically in point price-fixing cases discussed previously, this Court is probably being unnecessarily burdened with what follows. However, since these cases do reaffirm the same principle, namely, that when a state attempts to regulate interstate commerce, it must do so in a reasonable manner, the cases do shed some

light on the reasons a state's action will be stricken. Particularly important, as will be demonstrated below, is the availbility of other more reasonable alternative methods of accomplishing the state's desired purpose that do not so heavily burden interstate commerce.

The obvious application to Arkansas' price-fixing usury law is that if it were reasonably related to the market price of the various types of loans and the various types of lenders and borrowers, as is the case in most other states, there would not be the heavy burden on interstate commerce.

This principle was clearly stated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) as follows:

> If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In the present case, certainly the State could attempt to prohibit excessive charges by lenders in a rational, less oppressive manner as has every other state in the nation and as has the federal government. Interest rates could be tied to market indicators. Small loans could carry one rate and corporate loans another. The possibilities for reasonable regulation are endless. Yet the Arkansas law arbitrarily fixes the number 10, sets it in concrete in an 1874 constitution, causes economic chaos, and deprives citizens of their rights with no rational basis.

Other representative cases decided by this Court striking state laws as being an undue burden on interstate commerce because, on balance, the law imposed an unreasonable burden on interstate commerce when the desired local objective could be obtained by methods less

burdensome, are: *Southern Pacific Company v. State of Arizona*, 325 U.S. 761 (1945), *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), *Kassel v. Consolidated Freightways Corporation of Delaware*, ___ U.S. ___, 101 S.Ct. ___, 67 L.Ed. 580 (March 24, 1980), *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *State of Minnesota v. Barber*, 137 U.S. 313 (1890), *Baldwin v. Seelig*, 294 U.S. 511 (1935), *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), *The Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366 (1976), *Dean Milk Company v. Madison*, 340 U.S. 349 (1951), and *Hood v. Dumond*, 336 U.S. 525 (1949).

Under these authorities, the Arkansas arbitrary usury law, 10% for all loans for all times, set in concrete in the Constitution of 1874, must constitute an undue burden on interstate commerce with devastating impacts. It should, therefore, be stricken by this Court to make way for rational regulation.

D. THE ARKANSAS USURY LAW DENIES APPELLANTS EQUAL PROTECTION OF THE LAW IN VIOLATION THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Because the Arkansas usury law is not rationally related to the market place and does not have any other rational basis, its operation results in a grossly unequal application on Arkansans in violation of the Equal Protection Clause of the 14th Amendment. Although the law on its face operates equally against all persons, because of the widely known differences between lenders, borrowers and types of loan existing in the State, the impact of the law is patently unequal.

It is well settled that a state law violates the Equal Protection Clause of the 14th Amendment even though it

appears to be equal on its face, if in fact its operation results in unequal treatment. This Court recently reaffirmed this principle in *Williams v. Illinois*, 399 U.S. 235 (1970). In the *Williams* case, this Court held unconstitutional an Illinois law which required a prisoner to serve a longer period than the maximum provided in the statute, if he was unable to pay the fine portion of his sentence. The Court gave its reasoning as follows, which applies to the Arkansas usury law:

> It is clear, of course, that the sentence was not imposed upon a felon because of his indigency but because he had committed a crime. *And the Illinois Statute does not distinguish between defendants on the basis of ability to pay fines. But, as we said in Griffin v. Illinois, supra, 'a law non-discriminatory on its face may be grossly discriminatory in its operation.'* . . . Here the Illinois Statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the Statute extends to all defendants an apparent equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. 399 U.S. 235 at 242.

Applying this principle to the present case, it becomes apparent that the Arkansas usury law is a denial of equal protection to persons in Arkansas. The number of disparities in treatment by the operation of the law is great. A few of the more prominent examples follow.

Perhaps the most obvious example and closely in point to the situation in *Williams v. Illinois* is the impact upon persons with lesser income and wealth than others. It is common knowledge and the evidence clearly revealed that

for many years all small loans cannot be made without a loss at a 10% rate. Solely because their financial statement, collateral, or income will not justify a loan above the minimum size required by lenders in order to make a profit, thousands of Arkansans are denied the valuable right to obtain a loan for emergency financial needs, such as medical bills, groceries, rent, automobile repair, and other basic necessities. Temporary unemployment, sickness, and other catastrophes frequently make such loans absolutely vital to the continued financial survival of the individual and his family. As Bank Commissioner Lambert so plainly stated:

> I think the person that needs three hundred dollars or five hundred dollars needs it worse than somebody that needs ten thousand dollars. (R. 10)

Certainly the law was not designed for this purpose, there being no indication that the drafters of the Constitution in 1874 did so with the intention of depriving poor persons of the ability to obtain loans for emergencies. In fact, apparently just the opposite was the purpose, to allow the poor to *obtain* money at a *lower* interest rate. The effect is to *deny them the right to obtain* the money at *any* interest rate, unless the lender is willing to make the loan at a loss for charitable, humanitarian, or other reasons. Each time such person is denied the right to obtain a loan a lender, whether it be a small loan company such as those who have completely fled the state, or the local bank, is denied the right to engage in the other side of that transaction.

Similarly, all those persons who are not able to qualify for the tightened credit standards that result when lenders begin rationing credit during periods of high interest rates are likewise denied the right to obtain loans. Those who cannot meet the conditions of higher down payment and shorter terms which results in higher monthly payments, who do not have the necessary "blue chip" credit record, and who do not have the required history of deposits are denied the right to obtain credit.

Another class of persons denied the right to obtain the credit they need and desire due to the operation of the arbitrarily low price fixed, are small businessmen in Arkansas such as Luke Quinn and Ed Moore who do not have the national banking connections of IBM, Teletype, Truckstops of America, Inc., and others to whom the Arkansas usury law presents no problem. Yet these Arkansas businessmen are trying to compete with such nationally based concerns. As Luke Quinn testified, if a competitor should construct the restaurant that his customers are demanding at a newer and better truck stop across the freeway, solely because that competitor has national connections which Luke Quinn does not have allowing him to get a loan, his business will suffer even worse than it has and it could be wiped out.

All of these unequal impacts and other types that could be cited are again traced to the central problem. The price fixed is arbitrarily low and applies equally to persons in unequal circumstances. It, therefore, results in arbitrary impacts and is flagrant violation of the Equal Protection Clause.

The Arkansas Supreme Court in its opinion thought that the equal protection argument had no weight whatsoever because the law on its face applies equally to all persons. The problem that the Court failed to perceive was that because different types of loans to different types of persons required different rates at different times, a law which attempts to govern all by the same standard is of necessity not treating each person equally.

In short, equal regulation of unequal subjects is a denial of equal protection. For this reason, this Court should strike the Arkansas usury law as a gross denial of equal protection.

E. CONCLUSION.

This appeal presents substantial constitutional questions involving tremendous economic impact on thousands of Arkansans and persons desiring to do business with Arkansans. If this Court does not reverse the decision of the Arkansas Supreme Court based on this jurisdictional statement, any thought of affirmance should certainly be postponed for plenary consideration with briefs on the merits and oral argument. The questions presented are too important and too substantial to do otherwise for the thousands of Arkansans who are so severely impacted. The law is admittedly a totally irrational economic regulation severely affecting interstate commerce and depriving citizens of their liberty and property. If those citizens are to be thrown back into the lions' den of the polls to seek redress for violation of their constitutional rights, without the benefit of any judicial review of the law as the Arkansas Supreme Court held, then this Court should tell them so only after full consideration of the most serious questions presented.

Respectfully submitted,

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IX.

APPENDIX

A. COPY OF OPINION OF THE SUPREME COURT OF ARKANSAS APPEALED FROM, DATED APRIL 29, 1981.

SUPREME COURT OF ARKANSAS
No. 80-150
Opinion Delivered April 20, 1981.

QUINN-MOORE et al.,

Appellants,

V.

BEVERLY J. LAMBERT, Bank Commissioner, et al.,

Appellees.

Appeal from Pulaski Circuit Court; Bruce T. Bullion, Judge on Assignment.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. This is a test case brought to challenge the constitutional validity of Article 19 §13, of the 1874 Constitution of Arkansas, which provides that all contracts for a greater rate of interest than 10% per annum shall be void as to principal and interest. More than 130 witnesses presented testimony, much of it cumulative, at a six-week trial. This appeal is from a judgment holding that our constitutional provision does not offend the due process clause, the equal protection clause, or the commerce clause of the Constitution of the United States.

The only borrower among the appellants is Quinn-Moore, a joint venture which tried to borrow $385,000 to improve its truck-stop near Little Rock. Quinn-Moore arranged to borrow the money from two Arkansas banks at 12% interest, but the State Bank Commissioner ruled that the loan would be illegal. Quinn-Moore and the two banks then brought this action for a declaratory judgment, naming the Bank Commissioner and the Attorney General as defendants. Intervenors in support of the plaintiffs included the Arkansas Bankers Association, the Arkansas Savings & Loan Association, the Arkansas Mortgage Bankers Association, and others often falling within the definition of a moneyed corporation: "A corporation authorized to engage in the business of using money for the sake of making a profit upon it as money, as in case of banks, insurance companies, etc." Webster's Second New International Dictionary (1939). A few consumer representatives intervened in support of the defendants.

The essential facts, winnowed from a 3,500-page record, are not complicated. Banks, savings and loan associations, and similar moneyed corporations engage in lending money, but they do not have and doubtless cannot have the resources to lend their own money, in the sense of money contributed by their stockholders. Instead, financial institutions obtain money from the public by means of checking accounts, savings accounts, certificates of deposit, and other forms of borrowing. Those funds are then lent to others at an interest rate higher than the institutions themselves are paying.

For a century following the adoption of our 1874 Constitution the 10% interest ceiling presented no particular problems to moneyed corporations. They were able to pay not more than 2½% interest on deposits and to

relend profitably at 8% to 10%. But in the first half of the 1970's interest rates began to rise nationally at a rapid pace. Contributing factors were the Federal Reserve Board's attempts to halt inflation by means of high interest rates and the action of certain central banks in New York City and elsewhere fixing their prime interest rates at high levels. Arkansas financial institutions naturally had to pay higher interest rates to obtain money to lend, but the 10% usury limit fixed a ceiling that narrowed the margin of profit. Congress provided some relief by permitting certain institutions to charge more than the state's maximum. Congress also permitted the sale of money market certificates, beginning in June, 1978. Those certificates, however, paid such high rates of interest that they attracted money from checking and savings accounts and thus, as one expert witness put it, were a disaster to the supply of loanable funds.

When this case was tried in the fall of 1979 the moneyed corporations were unquestionably operating profitably. The Bank Commissioner testified that the institutions' growth and profits had not been affected, but the squeeze was beginning to show. Various economies had been put into effect. One bank had reduced its staff by 71 persons; a mortgage company had dropped from 17 employees to 12. Even so, profits continued. One witness's complaint was that his bank had only $325,000,000 out on loan, when without the 10% interest ceiling it might have been $400,000,000. There was other similar testimony.

The witnesses tended to stress not so much that the moneyed corporations were being hurt but that consumers were suffering. Some banks had stopped making loans of less than $2,000; others had somewhat lower minimums. About 15 affidavits, as abstracted, contain an identical

sentence: "Borrowers are being hurt because of our institution's inability to loan money to them." Yet the general public is not shown to be dissatisfied with the 10% usury limit. The Secretaryof State testified that at the 1974 general election a proposal to remove the interest ceiling by authorizing the legislature to control it was defeated by a vote of more than six to one, 426,197 to 66,905.

As far as we know, usury laws exist in all the states. *See Usury: Issues in Calculation*, 34 Ark. L. Rev. 442, 444 (1980). Such laws are based upon a universally recognized public policy that protects necessitous borrowers from the exaction of exorbitant interest by unscrupulous lenders. Indeed, the appellants themselves concede the need for some ceiling on interest rates, for they say about the 1874 constitutional limitation: "The law should be stricken so that reasonable laws governing the use of money can be enacted. There are literally hundreds of rational methods of regulating interest rates . . . The law must be stricken to make way for rational regulation." Thus the argument stresses reasonableness: Some interest ceiling is permissible, but a limitation of 10% is arbitrary.

We turn first to the appellants' principal point, that the challenged rate is so irrational as to deny them due process of law. Counsel impliedly concede that they have not been able to find a single case decided anywhere at any time holding that an interest ceiling denies due process of law. Faced with this total want of supporting authority, counsel have come up with a theory that interest is the price paid for money and therefore any regulation of interest rates is a forbidden method of price fixing. Actually, money is the medium of exchange and cannot itself have a price except in relation to foreign currency.

Two lines of cases are cited, but neither bears any real resemblance to the cases at hand. First are public utility rate cases, in which the courts hold that a rate of return cannot be so low as to confiscate the utility company's property. But the clear-cut distinction is that a public utility devotes its property to the public service, must serve any and all members of the community without discrimination, and is therefore entitled to a guaranteed but reasonably limited return on its investment. By contrast, the appellants do not devote their property to the public service, are entitled to pick and choose those to whom they will make loans, and are not entitled to a guaranteed return of any kind.

Second are cases invalidating laws that seek to set a minimum price for goods or services having no bearing upon the public health or safety. We have, for example, struck down a law making it a misdemeanor for a barber to charge less for a haircut or shave than the minimum price fixed by the State Board of Examiners. *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189 (1942). In a later case we struck down a "fair trade" law permitting a manufacturer to fix the minimum price at which his product could be sold at retail. *Union Carbide & Carbon Corp. v. White River Distributors*, 224 Ark. 558, 275 S.W.2d 455 (1955). Such cases protect the public from being overcharged by means of an artificial floor keeping prices at high levels.

Here, by contrast, the appellants seek a license to charge any interest rate they choose, bringing us full circle back to the very purpose of the usury laws. Moreover, the financial squeeze on which the moneyed corporations base their argument must be attributed in a substantial degree to the actions of the financial institutions themselves, especially the large New York banks. We find no violation of due process of law.

The appellants' argument under the commerce clause is to some extent a repetition of their due process argument, with the added statement that our assertedly arbitrary usury limit is a burden on interstate commerce. We are not sure, however, just what kind of commerce is being burdened. Apparently the reference is to the flow of money when it is sent from one state to be lent or invested in another state. Certainly, according to the proof, money does leave Arkansas when out-of-state investments are available at a higher rate of interest. One witness testified, for example, that his bank loses investments in certificates of deposit whenever the interest rate elsewhere is more than a fourth of one per cent above the Arkansas rate. Even so, that is apparently a natural result whenever one state, although halfway across the continent, offers a better investment opportunity than another. If that is an unconstitutional burden on interstate commerce, then such burdens occur constantly, and all interest restrictions become invalid. Every such argument is self-defeating.

Finally, the appellants' equal protection argument hardly requires serious discussion. The 10% usury limit contains no classification of any kind, has a similar effect upon all persons similarly situated, and thus cannot deny equal protection. The appellants merely mention differing remote consequences of the law, such as the small borrower's inability to obtain a loan from certain banks in Little Rock because those banks cannot profitably lend small amounts. Almost every constitutional provision has indirect consequences that may affect different persons in different ways, but there is no denial of equal protection unless the constitutional provision itself embodies an unreasonable classification. No inequality is to be found in the challenged section of our Constitution.

Ultimately the question in this case narrows down not to an issue of constitutional law but to one of public policy: What should be the maximum interest rate in Arkansas? The appellants' extensive testimony can certainly be interpreted to indicate that on balance the present effect of our 10% usury ceiling is not favorable to the state's economy as a whole. There is also testimony to the contrary. We are not called upon, however, to pass judgment upon the wisdom of our usury law. If it is to be changed it must be done by popular vote, not by judicial decision.

Affirmed.

Holt, J., Not participating.

B. COPY OF THE OPINION SPECIAL CIRCUIT JUDGE BRUCE T. BULLION, DATED MARCH 6, 1980.

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

QUINN-MOORE, ET AL PLAINTIFFS

VS. NO. 78-6045

BEVERLY LAMBERT, JR., ET AL DEFENDANTS

MEMORANDUM OPINION

DATE: March 6, 1980.

This case challenges the usury laws of the State of Arkansas [1] as being violative of the Commerce Clause [2], and the Equal Protection and Due Process Clauses [3] of the Constitution of the United States. I find the Commerce Clause argument to be a novel, but most interesting, approach [4] in this area of concern, founded upon principles of law well established in other areas of business pursuit; and that the question for decision on this point is whether those principles should be, by judicial fiat, extended to include interest rates and usury policies. In this connection, the plaintiffs argue that the Arkansas interest limitation is

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1.

Article 19, Section 13 of the 1874 Constitution of the State of Arkansas, viz: "All contracts for a greater rate of interest than 10% per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be 6% per annum". Also, the legislative implementing Acts thereunder codified in Vol. 6A, Ark. Stats. Anno., Ch. 6 "Money, Interest and Usury".

2.

Article 1, Section 8(3) of the U.S. Constitution: "(1). The Congress shall have power . . . (3) to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;".

3.

14th Amendment to the U.S. Constitution: "Sec. 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4.

The plaintiffs do not refer the court to any authority that suggests that interest ceilings or usury laws are, or should be, considered to be included within the price fixing principles of law well established in the business areas referred to. (R. 181)

governmental price fixing for the use of money, a commodity, and because price-fixing has been judicially frowned upon, historically (price fixing examples cited by plaintiffs are: utility rate cases, fair trade acts, permissible charges by barbers, fees charged by employment agencies, grain warehousemen charges, common carrier rates, and many others), the Arkansas usury laws are invalid. The principles of law established in the business areas referred to are too well fixed to argue, so this is not a part of the problem the court now faces.

Plaintiffs, after firmly establishing those principles of illegal governmental price fixing, without legal authority to substantiate the conclusion that usury laws are included within them, conclude that there is no logical reason why these same rules should not apply to state enacted interest ceilings because they are not rationally related to prevailing interest rates over the nation; that because they are so unrelated, they are arbitrary and unreasonable, and therefore legally void. This being true, say plaintiffs, the challenged Arkansas usury laws impose an undue burden on interstate commerce in violation of the Commerce Clause.

Plaintiffs argument that the Arkansas usury laws violate the Due Process guaranties of the 14th Amendment is, in part, related to the Commerce Clause argument, so it will not be repeated, although there are variations that will be touched upon hereafter. As to their Equal Protection argument, they urge that the impact of these usury laws do not operate equally upon all Arkansas borrowers and/or lenders because of the widely known differences between types of loans (e.g., small personal loans vs. large

commercial loans) and cite such example as: (1). Persons of unequal wealth and income [5]; (2). Those unable to qualify for the tightened credit standards resulting when lenders begin rationing credit [6]; (3). small businessmen, such as Q-M, with no national banking connections [7]; (4). lenders limited to the 10% ceiling trying to compete with lenders permitted to charge in excess thereof; and (5). lenders and borrowers located near bordering states with higher interest ceilings, cannot compete with those out-of-state lenders. [8]

Plaintiffs do not cite one case, or other authority, to substantiate a conclusion that the ability to borrow money, whether because of the Arkansas usury policies, bad credit, poor health, unestablished credit rating, unsubstantiated business success for which financing is sought, the mere unavailability of money in a given locality, or whatever, is

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5.
Plaintiffs state that all small loans cannot be made at 10% without a loss, so persons with insufficient assets, or income, cannot obtain a loan over the minimum size and are thus denied the valuable right to obtain a loan, even for emergency purposes.

6.
Plaintiffs state that those unable to meet higher down-payment requirements and higher monthly payments, having no "blue chip" credit record, are denied this valuable right.

7.
Such as IBM, Teletype, or competitors of Q-M with such national banking connections that can borrow the money needed to build a competing facility down the road from the Q-M Truck Stop. (R. 182)

8.
The conclusion plaintiffs draw from these examples are that the law impacts these various groups unequally (to which I take no exception from the lenders' point of view), all because of the fact the Arkansas interest rate is arbitrarily low (which seems to me to be open to considerable argument). (R. 183)

violative of the 14th Amendment. The case of *Williams v. Illinois* [9] is referred to as an example of the principle that a law, non-discriminatory on its face, may be grossly discriminatory in its operation (as they urge is the case in the examples cited when considered in the light of the Arkansas usury laws).

A couple of preliminary matters require disposition before the merits of this case can be considered: (1). A demurrer to this complaint [10]; (2). A motion to clarify jurisdiction of this court and dismiss the complaint for lack of jurisdiction, and, (3). for improper parties plaintiff and/or defendant.

I find no difficulty in overruling the demurrer (the complaint states a cause of action), and in finding that all necessary parties plaintiff and defendant are joined properly. It may be that the Attorney General falls within the category of but a proper party defendant, but I do not conceive that this creates a defect to the complaint requiring its dismissal. However, the problem of jurisdiction of this court does give me difficulty. This arises from the fact that this state has adopted an Administrative Procedure Act [11], and I do not find that the State Bank

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9.
399 U.S. 235, 26 L.Ed.2d 586 (1970). An Illinois criminal statute providing that one convicted of a crime was to serve a prescribed sentence therefor, but the period could be shortened upon the payment of a money fine. The United States Supreme Court found that this statute – its impact – discriminated against the indigent criminal. (R. 184-185)

10.
See Rule 7 (c) of the Arkansas Rules of Civil Procedure, effective July 1, 1979.

11.
Sec. 5-701, et seq., Ark. Stats. Anno.

Board is excluded from its requirement [12]. It, of course, supervises the operations of all state chartered banking institutions, and it is not beyond possibility that this record should have been developed in a hearing before that State agency.

One of the foundation legs upon which this suit is premised is a letter, written by the State Bank Commissioner to the American State Bank of Charleston, Ark. (American), containing the advice that American must write-off, as an invalid asset, its 15% participation in the Q-M loan, and with the further admonition to make no further advances to Q-M on this loan. The reason given was that the Q-M loan was constitutionally usurious because it exceeded the prescribed 10% maximum rate.

While it is tempting to determine that this technical problem resolves this litigation, I elect to proceed otherwise. Arkansas has adopted, also, a Declaratory Judgment Act [13] with jurisdiction vested in both Circuit and Chancery courts. And, because I have always viewed the problems presented by this complaint to be questions of law (the alleged factual background has never been seriously in dispute, and there is no evidence to the contrary—it is the conclusions to be drawn from those facts that bring about the arguments), I find that no further hearing was necessary before that Administrative Agency, the exchanged letters between American and the State Banking Commissioner being all that is required, if that.

12.
Sec. 5-701 (a), Ark. Stats. Anno., incl. the 1979 supp.

13.
Sec. 34-2501, et seq., Ark. Stats. Anno.

And so, I overrule all technical pleadings-demurrers, motions to clarify jurisdiction, to dismiss, and defect in parties, to reach the real issues raised. Obviously, the questions raised beg for resolution, the best evidence of this being the almost total unanimity in the financial segment of this state, as evidenced by their interventions filed on behalf of plaintiffs' position.

A question of mootness of this litigation has arisen also, based upon the fact that the First National Bank in Little Rock (First), at least from the opening day of this protracted trial and up to the present; and that American, from and after November 5, 1979 [14]; could make this 12% loan, legally, because of the congressional preemption of the Arkansas usury policy. The plaintiffs argue that even though this is true, First and American have advanced to Q-M on 10-31-78, the sum of $10,000.00, which, in the case of American at least, the repayment thereof is yet subject to the defense of usury by Q-M. I do not disagree with this argument of plaintiffs and so hold that this suit is not now moot [15], but cannot help but observe: that the fact that Q-M, First, and American are all parties plaintiff in this action seeking validation of this loan; that their complaint indicates that Q-M insists upon the legal freedom, unhampered by Arkansas usury policies, to borrow not only

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14.
The day that the President signed into law H.R. 2515, interestingly entitled "The Borrowers Relief Act", which amended 12 U.S.C. Sec. 85 of the National Bank Act, and 12 U.S.C. Secs. 1811-1831, the Federal Deposit Insurance Act, and the National Housing Act, 12 U.S.C. Secs. 1724-1720 (f). (R. 186)

15.
And even though there seems to me to be a logical "out" available to First and American by simply withholding from the total loan the sum of $10,000; or to simply restructure the loan subsequent to 11-5-79. (R. 187-188)

the money involved here, but to do likewise in the future and at interest rates in excess of 10%; and the fact that Mr. Quinn, by his knowledgeable and articulate testimony, gave full support to the purposes of this suit; gives some credence to the argument of defendants that the suit is in reality moot.

This brings the matter to its merits, the trial of which extended over several weeks and with a proliferation of expert, knowledgeable and articulate witnesses [16] in matters financial and economic. In this process the loan agreement between the parties plaintiff was established; that the parties plaintiff considered it a feasible loan, as structured; that the purpose of the loan was to construct and enlarge a highly successful restaurant facility (using interstate materials and serving interstate customers) known as the Texaco Truck Stop located near the intersection of Interstate Highways 30 and 430, and owned by Q-M; that an initial advance of $10,000, [17] was made to Q-M of the total amount of the loan, $385,000, at 12%; and that the Bank Commissioner had given American the advices mentioned heretofore in response to inquiry by American on the subject.

Then followed the financial and economic experts, all highly qualified and respected for their judgments in their particular areas. The gist of their testimony was, as alleged in the complaint: that money is a commodity moving daily in interstate commerce (with which this court does not

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16.
Plus hundreds of exhibits and affidavits.

17.
First advanced $8,500, American $1,500.

disagree); that interest rates in Arkansas (usury laws ignored for this purpose) are controlled by national factors such as the New York prime rate [18], and the Federal Reserve discount rate [19]; that the effect of the Arkansas 10% rate causes investment money to flow out of Arkansas [20], not into it; and that the effect of this outward flow causes a great curtailment to the economic progress of this State. (Because of so many variables in our national economic picture, predominantely invidious and accelerating inflation, I do not accept this last observation as totally correct). Also, and while I recognize it is little surcease to Arkansas lenders, Arkansas borrowers are not completely eliminated from this national lending scene [21].

A brief look at Arkansas usury policies, from an historical standpoint, and as they may relate, from time to time, to interest rate control by the federal government, may help bring better understanding to the constitutional issues raised by plaintiffs.

18.
The rate established by New York City banking institutions for the most credit worthy borrowers in the nation. At the time this memorandum is being put together, this rate is 17¼%.

19.
At the time this memorandum is being put together, this rate is 13%. (R. 189)

20.
There is no doubt but that investment money seeks its highest yield.

21.
See Cooper v. Cherokee Village Dev. Co., Inc., 1963, 236 Ark. 37, 364 S.W.2d 158.

First, the State: Arkansas was admitted into the Union of states in 1836, and its constitution of that year did not contain any provision that related to interest charges or usury policies. However, the General Assembly authorized by that document, and thereafter elected, was quick to deal with the subject, for by Act of February 16, 1838 [22] the maximum interest rate permissible in Arkansas was fixed at 10%. This 10% maximum interest rate survived the 1861 and 1864 constitutions of Arkansas, neither of which contained provisions for interest charged and usury policies. However, our fourth constitution, adopted in 1868, contained the following provisions:

> "The General Assembly may, by general law, declare the legal rate of interest upon contracts in which no rate of interest is specified, but no law limiting the rate of interest for which individuals may contract in this State shall ever be passed." [23]

Thus, the 30 year life of the 10% maximum interest rate prescribed by the Act of February 16, 1838 [24]came to an end. However, Art. 15, Sec. 21 of the 1868 Constitution lasted but 6 years [25], for in 1874 Arkansas adopted its fifth Constitution which contains the interest rate-usury

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22.
Chapter 92, Gould's Digest. (R. 190)

23.
Article 15, Section 21 of the 1868 Constitution of Arkansas.

24.
This Act was upheld in Jones v. McLean, 1857, 18 Ark. 456. (R. 191)

25.
The validity of this provision was upheld in German Bank v. Deshon, 1883, 31 Ark. 331.

provision the plaintiffs now assail [26]. The 1874 constitutional interest rate-usury policy provision, to the present time, has withstood at least three attempts to amend it, once in the 1950's, and twice in the 1970's. Each time a majority of the people of Arkansas voted to retain the 10% limitation. And so we find that of a total of 144 years of the existence of this State, for a total of 136 of them, the 10% maximum rate has been our state policy – 30 years by statute, and 106 years by constitutional provision. It would be remiss not to observe at this point, that over this long history of this subject, the Supreme Court of Arkansas has considered hundreds of cases involving alleged usury [27], and in spite of this quantity, the plaintiffs do not point to one case that considers the arguments they now advance. New and novel questions of law do constantly arise in almost every area of human endeavor, and the fact that these arguments have not heretofore been considered, standing alone, is in no way determinative of them. It is abundantly clear that the questions now considered are serious and substantial, and counsel for plaintiffs are in no small measure due great credit for the ingenuity of them.

Now the federal history: The 1787 Constitution of the U.S. contains no provision dealing with interest rates or usury policies. Actually, there seems to be nothing in that document that relates to any type of economic system under which the people of this new nation were to operate. It was not until 1864, some 77 years after that Constitution was

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26.
See Note 1.

27.
See Vol. 17, West's Arkansas Digest, Ch. on "Usury", beginning at p. 181, and incl. the 1979 supp.

adopted, that the federal government entered the field of interest rates and usury policies, for it was in that year that Congress enacted the National Bank Act [28] which contained a provision that the several states were to regulate the interest rate which a National Bank, located in such state, could charge on loans [29]. The clear expression of this new federal law leaves nothing to the imagination as to the intent of Congress in the field of interest rates-usury policy. That is, that Congress recognized, and yielded to, the usury policies of the several states, thus validating their interest in protecting their citizens against usury.

This absolute recognition by Congress that state usury laws were to be the law of this land, remained the policy of Congress until sometime in the early 1930's [30] when Congress amended 12 U.S.C. Sec. 85 to provide that a national bank (note the exclusion of all other lenders) could charge:

> "... interest at the rate allowed by the laws of the state ... where the bank is located, or at a rate of 1% in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, whichever may be the greater ...".

28.
12 U.S.C. Secs. 21, et seq. (R. 192)

29.
12 U.S.C. Sec. 85, as originally enacted.

30.
I am not sure of this exact date, but its accuracy is of no importance to the result.

This amendment establishes what I believe is commonly called in financial circles, "the federal reserve discount rate". It is to be noted that in the enactment of this 1930's Amendment, there is a clear congressional intent to partially yield to state usury policies, while at the same time exercising, partially, its obvious constitutional plenary powers to invoke national supremacy over interest charted.

In 1974 this nation experienced an economic recession that brought about unusually high interest rates. As an effort designed to alleviate curtailed lending and borrowing that existing during this depressed period, there was enacted into law, by Congress, the second amendment to Sec. 85 of 12 U.S.C. over this 110 year period since Congress first entered the interest rate area. This last mentioned amendment was commonly known as the Brock Bill, and while I am fairly sure it is identical, or almost so, with the third amendment, infra, because I do not have that reference before me I will not attempt to quote it. The third amendment to Sec. 85, 12 U.S.C. was introduced into the House of Representatives by all Arkansas Representatives [31] sometime in 1979, is worded to apply only to the State of Arkansas, and contains provision that make it expire, automatically, on December 31, 1980. It contains several provisions, but I will set forth but two in detail. As amended by H.R. 2515, Sec. 85, 12 U.S.C. now reads:

31.
H.R. 2515 bears the curious title "Borrowers Relief Act". (R. 193)

31A.
This quoted section applies only to nationally chartered banks.

> " . . . interest at the rate allowed by the laws of the state . . . where the bank is located, or at a rate of 1% in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, 'or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5% in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, whichever may be the greater' . . . " [31A]

The ensuing provision of H.R. 2515 amends the Federal Deposit Insurance Act [32] by adding:

> "Sec. 26 (a). In order to prevent discrimination against state-chartered insured banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such state bank would be permitted to charge in the absence of this subsection, a state bank may in the case of business or agricultural loans in the amount of $25,000 or more, notwithstanding any State Constitution or statute, which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 5% in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run."

Sec. 26 (b) of H.R. 2515 contains a penalty provision for excessive interest charges, which I omit. The Act then goes

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32.
12 U.S.C. Secs. 1811-1831.

on to amend Title IV of the National Housing Act [33], the Small Business Investment Act of 1958, as amended [34], and for any financial institution chartered pursuant to the statutes of the U.S., the privilege to the designated lending institutions of charging interest at a rate not to exceed 5% above the federal discount rate, or the rate of their state of domicile, whichever was the greater, penalty provisions applicable to all for excessive charges. H.R. 2515 was made to apply to loans made after 11-5-79. Also amended thereby was the Federal Reserve Act [35], as follows:

> "No insured nonmember bank . . . may plead . . . with respect to any deposit (etc.) . . . any defense . . . under any provision of a statute or constitution of a state . . . regulating or limiting the rate of interest which may be charged . . . and any such provision is hereby pre-empted . . . ".

And finally, the Federal Home Loan Bank Act [37] was amended in the same manner as the other mentioned federal financial programs, supra, the effect of it like the other detailed, being to preempt the Arkansas usury policy for the period 11-5-79 to 12-31-80.

33.
12 U.S.C. Secs. 1724-1730 (f). (R. 194)

34.
15 U.S.C. 661.

35.
12 U.S.C. 461. et seq.

36.
See Note 32.

37.
12 U.S.C. 1425 (b). (R. 195)

It is important to bear in mind that H.R. 2515, and all of its provisions, unless later extended, will be in existence a little less than 14 months, at the end of which time the congressional preemption of the Arkansas usury policy will expire, and our State usury policy will again prevail. Other examples of this congressional attitude to leave usury policies to state regulation are: An Act of Congress, amending the National Housing Act as it was affected (R. 192) by the California usury laws [38], which Act preempted the usury policies of California as they applied to FHA and VA housing loans only. Preemption of the entirety of the California usury laws was before Congress at that time, but rather than exercise this total power, Congress restricted it as above stated [39]. Of further interest is the fact that this congressional amendment was made to be superceded, automatically, if a then proposed California usury law was later enacted. A clear demonstration of the national policy of Congress to leave usury policies to the various states. The Truth in Lending Act of Congress [40], Sec. 1610 (b) provides:

> "This subchapter does not otherwise . . . affect in any manner the meaning . . . of the laws of any State, including .. . . laws relating to . . . amounts or rates of charges . . . permissible under such laws in connection with the extension or use of credit . . . ".

38.
Sec. 1709-1a. Ch. 37, Title 38, U.S.C.

39.
Comm: Against Unfair Int. Limits, et al v. California, et al decided 8-2-79.

40.
15 U.S.C., Secs. 1601, et seq.

In all of these congressional Acts above referred to, while it is true that in some, the state usury policies were on a limited basis, nationally preempted for a stated period (except in the case of nationally chartered banks), but in each and all there is a consistent national policy evidenced to yield to state usury policies, and to not preempt the field of interest charges in their entirety. Furthermore, that Congress has never recognized any U.S. Constitutional prohibition against this long established policy, Commerce Clause, Due Process and/or Equal Protection, notwithstanding. In this connection, it is inconceivable that over the past 116 years since Congress first entered the interest rate field, and with its most apparent and constant expressions in connection therewith to not only validate state usury policies but to accommodate them, that if there was some U.S. Constitutional provision absolutely prohibiting such state usury policies, or against congressional concession of its unquestioned plenary power to totally preempt the field, that such an error would long ago have been corrected, or at least recognized, and state usury policies invalidated, regardless of economic conditions, congressional desire, or other considerations.

Surely it cannot be argued that Congress has been unaware, for the past 156 years (and probably longer), of the full extent of the meaning of the Commerce Clause and the total power it possesses to preempt interest rates over the United States. "While the phrase 'intrastate commerce' which is completely internal . . . and which does not extend to or affect other states [41] (cannot be invaded by Congress),

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41.
Gibbons v. Ogden, 1824, 22 U.S. (9 Wheat.) 1, 194, 6 L.Ed. 23. (R. 196)

the notion of what is 'completely internal' traditionally has been strictly and narrowly confined. For a business activity to come within the scope of the commerce clause, it need only have a substantial effect on interstate commerce. [42] as long as such an effect or interstate commerce is shown to exist, it is immaterial whether the activity in question is itself either wholly or primarily intrastate in nature. [43] With regard to a claim of unlawful interference therewith: "(I)t has long been understood that, in the absence of conflicting federal legislation on a subject of potential regulation (interest rates here), the states retain a 'residiuum of power' to adopt their own regulations concerning that subject [44]."

The case of *Aldens, Inc. v. Packel*, 1975 (CCA-3), 524 F.2d 38, cir. den. sub. nom. *Aldens v. Kane*, 425 U.S. 943, appears to be a complete contrary determination of the arguments of plaintiffs that the Arkansas usury policy is a federally unconstitutional exercise of power reserved exclusively to the federal government, and none other. There it was said:

> "This express congressional recognition of the appropriateness of a state law role with respect to

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42.
Katzenbach v. McClung, 1964, 379 U.S. 294, 13 L.Ed.2d 290; Wickard v. Filburn, 1942, 317 U.S. 111, 87 L.Ed.2d 122.

43.
BT Inv. Mgrs., Inc. v. Lewis, 1978, USDC-ND-Fla., 461 F. Supp. 1187.

44.
So. Pac. Co. v. Arizona, 1945, 325 U.S. 761, 89 L.Ed. 1915; Hunt v. Wash. Apple Adv. Comm., 1977 432 U.S. 333, 53 L.Ed.2d 383.

interest rates in the field of consumer credit serves to (show that a uniform national rule is not necessary). It might be argued that Sec. 1610 (b) may be construed as an express adoption of state law as the appropriate federal standard for measuring interest rates in consumer credit transactions. But, even if Sec. 1610 (b) is not so construed, at a minimum it is a congressional recognition that the maximum level of interest rates in consumer credit transactions is not a subject matter requiring a uniform national rule. In face of this express congressional recognition that national uniformity is not required it would not, we suppose, be open to the court to hold otherwise . . . The fundamental issue is whether the national interest in the free movement of money . . . outweighs the valid local interest in restricting maximum interest rates on consumer 'loans' and setting uniform contract terms for such transactions. Before emergence of a national currency and a national monetary policy, and especially before the emergence of national concern over consumer protection in interstate commerce, the issue would not have been seriously debated. But, even in the period since these developments, no case that we have been referred to has even so much as hinted that usury laws and related contract laws are not appropriate matters for local regulation. This despite the fact that such recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws, any judgment that transactions has burdened commerce must be made by Congress."

I will belabor this point no further as the last cited case makes it much too clear that even though the Arkansas usury laws may, and probably do, burden interstate commerce to some extent, it is a constitutionally permissible burden, not violative of any constitutional principle; and until Congress elects to preempt this interest area, as it has now done partially by the enactment of H.R. 2515, the Arkansas usury policies are a valid exercise of

state police powers; an expression of the public policy of this State with rational and reasonable basis therefor during the long period of their existence, and irrespective of national factors that may tend to "dry up" money available for lending purposes in Arkansas. Usury has been a matter of public concern since Biblical times, and the maximum number, whatever it may be, is nothing more, nor less, than the public policy of the jurisdiction prescribing it, and to that extent it is rationally related and not arbitrary or unreasonable. I conclude, therefore, that whatever change is to be made in the format of the Arkansas usury policy, is not for judicial determination, but addresses itself to the wisdom of the legislature, the vote of the people of this State, or to the Congress, as the case may be [45].

The 14th Amendment arguments of the plaintiffs, conspicuously absent of direct authority that its constitutional principles are even involved in the lending field, are not persuasive. The Arkansas usury laws contain no classification as to lenders or borrowers, and the 10% limitation falls evenly upon all Arkansans, applicable to each and every lending transaction, no matter its size, its purpose, or any other consideration. I agree with plaintiffs that a 10% maximum rate is not rationally related to any other interest rate in excess thereof, whether it be 13%, 17¼%, or 50%, but it would seem that the same argument would apply to a 13% Federal Reserve discount rate when being compared to a New York City prime rate of 17¼%. The case of *Williams v. Illinois*, supra, cited by plaintiffs, demonstrating that a criminal statute that measures the length of punishment by the financial ability of the criminal

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45.

See also Derenco, Inc. v. B.F. Fed. S & L, 1978, 281 Or. 533, 577 P.2d 477, cer. den. 99 S.Ct. 733; and State v. Spiegel, Inc., 1979 (So. Dak.) 277 N.W.2d 298. (R. 198)

is a violation of Equal Protection, is easily distinguishable and not applicable to the facts of this case. Granted it stands for the proposition that a criminal statute, facially even, must impact those it affects with the same evenness; but to transpose that principle to these facts is not sound. If that was the law, it would seem to be equally as arguable that citizens, in whatever state considered, who, because of inadequate finances, cannot afford the cost of a home, a boat, an automobile, a set of flat silvers, etc., are denied Equal Protection simply because others are able to do so. Under our economic system, so far, those who are able to borrow money, or purchase things, because they are financially able to do so, while others less fortunate and not so financially able cannot do so, is not violative of any constitutional principle of which I am aware; but it is not arguable that the impact of the system is unequal from a financial standpoint. The borrowing and lending of money is nothing more than an expression, and extension, of free enterprise, with the right in each to pick and choose within the confines of the usury policies, if any; and, so long as those laws apply and impact all with an even hand, as do our usury laws, the destruction of them is not of judicial jurisdiction. I find the Arkansas usury laws, judicially valid, and if change is needed, the people of Arkansas, in November, 1980, will have ample opportunity to select the change they require. [46]

The analogy the plaintiffs draw between our usury laws and governmental price fixing prohibitions is clever and resourceful, but I do not agree that the comparison is a

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46.

See Griffin v. Conn., 1910, 218 U.S. 563, 54 L.Ed. 1151; Mut. Loan Co. v. Martell, 1191, 222 U.S. 225, 56 L.Ed. 175; Morgan v. Ga., 1930, 281 U.S. 691, 74 L.Ed. 1120; Jannette v. Hardie, 1933, 290 U.S. 620, 78 L.Ed. 529; Nat'l. Acct. Co. v. Doorman, 1935, 295 U.S. 718, 79 L.Ed. 1673.

valid one. As previously observed and with ample case authority to substantiate the principle, the regulation of interest by the several states is a proper subject of state regulation as a valid exercise of their valid police powers [47]. As I am referred to no authority that even hints that interest matters (usury) have ever been considered to fall within the category of illegal governmental price fixing, I assume none exist. And, in the face of the abundant authority leading to the contrary conclusion, I am unwilling to bridge that broad gap. In the final analysis, if this problem really is a Due Process, Equal Protection or Commerce Clause concern, in view of the long history of cases, both state and federal, dealing with the subject in a direct way, it is unbelievable that the principles of law connecting them with price fixing would not long ago have emerged and been established. This very silence is a strong reason to find that a well structured, although perhaps harsh, usury policy, as found in our 1874 Constitution, is judicially valid and enforceable; to say nothing of the authorities to the contrary to plaintiff's arguments which are above discussed.

As of this date, and for so long as the federal preempting laws remain in effect, the Arkansas usury policy, as it applies to the types of loans included with the scope of those federal preempting laws, is in suspended animation. But to the extent of lending transactions not included therein, the Arkansas usury laws are viable and enforceable. Should the federal preempting laws expire, whatever is the then usury policy of the State will automatically spring to life.

47.
Sproles v. Binford, 1932, 286 U.S. 374; Ferguson v. Skrupa, 1963, 372 U.S. 732. (R. 199)

Mr. Meeks will prepare an appropriate precedent in line herewith, dismissing the plaintiff's complaint without relief, with prejudice, and at their cost. A copy thereof will be submitted to counsel for plaintiffs, for comment, prior to presenting it to the court for signature and entry. I expect counsel for both parties to furnish counsel for intervenors in their behalf (those requesting the same) a copy of this memorandum for their individual use.

The excellence of your presentations and arguments, the novel and creative issues presented, plus other factors, have made this a most difficult case. Your excellent cooperation and performance has been of immense assistance, and I thank you.

Bruce T. Bullion
Special Circuit Judge
(by assignment)

C. COPY OF NOTICE OF APPEAL FILED JUNE 9, 1981 WITH THE SUPREME COURT OF ARKANSAS.

IN THE SUPREME COURT OF ARKANSAS

QUINN-MOORE, A JOINT VENTURE d/b/a TEXACO TRUCK CENTER; LUKE QUINN; MILDRED QUINN; ED MOORE; CAROLYN MOORE; THE FIRST NATIONAL BANK IN LITTLE ROCK; AMERICAN STATE BANK; ARKANSAS BANKERS ASSOCIATION; ARKANSAS SAVINGS & LOAN LEAGUE; ARKANSAS MORTGAGE BANKERS ASSOCIATION; ARKANSAS CREDIT UNION

LEAGUE; ARKANSAS STATE CHAMBER OF COMMERCE; ARKANSAS AUTOMOBILE DEALERS ASSOCIATION, INC.; NORTH PULASKI BOARD OF REALTORS; ARKANSAS FINANCIAL SERVICES, INC.; COMMERCIAL NATIONAL BANK; FIRST ARKANSAS BANKSTOCK CORPORATION; FIRST NATIONAL BANK IN HOT SPRINGS; FAUSETT & COMPANY; RECTOR-PHILLIPS-MORSE, INC.; THE STEPHENS SECURITY BANK OF STEPHENS, ARKANSAS; AUSTIN WIGGINS COMPANY; WORTHEN BANK & TRUST COMPANY APPELLANTS

V. NO. 80-150

BEVERLY J. LAMBERT, BANK COMMISSIONER, STATE OF ARKANSAS; STEVE CLARK, ATTORNEY GENERAL, STATE OF ARKANSAS; ARKANSAS STATE AFL-CIO; ACORN; ARKANSAS CONSUMER RESEARCH, INC.; and ELIZABETH McALLESTER APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn, Mildred Quinn, Ed Moore, Carolyn Moore, The First National Bank in Little Rock, American State Bank, Arkansas Bankers Association, Arkansas Savings & Loan League, Arkansas Mortgage Bankers Association, Arkansas Credit Union League, (Arkansas Mortgage Bankers Association, Arkansas Credit Union League, Arkansas State Chamber of Commerce, Arkansas Automobile Dealers Association, Inc.,

North Pulaski Board of Realtors, Arkansas Financial Services, Inc., Commercial National Bank, First Arkansas Bankstock Corporation, First National Bank in Hot Springs, Fausett & Company, Rector-Philips-Morse, The Stephens Security Bank of Stephens, Arkansas, Austin Wiggins Company and Worthen Bank & Trust Company hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas, affirming the dismissal of the complaint, entered in this action on April 20, 1981.

Filed June 9, 1981
Dona L. Williams
Clerk

This appeal is taken pursuant to 28 USC §1257 (2).

/s/ Herschel H. Friday, Jr.

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CERTIFICATE OF SERVICE

The foregoing notice of appeal has been served on all parties required to be served by depositing the notice in a United States Post Office, with first class postage prepaid, addressed to their counsel of record at his post office address, on the 9th day of June, 1981, as follows:

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Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,

IN THE

Supreme Court Of The United States

NO. 81-131
OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

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IN THE

Supreme Court Of The United States

NO. 81-131

OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

III.

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to dismss the

appeal herein taken on the grounds that the questions presented are so unsubstantial as not to need further argument.

IV.
STATEMENT

This case concerns the validity of the Arkansas 10% usury law, which prohibits the making of contracts for a greater rate of interest than 10% per annum. [1] Scores of witnesses appeared before the trial court which, on March 6, 1980, ruled that the state's usury law did not offend the Due Process Clause, the Commerce Clause, or the Equal Protection Clause of the Constitution of the United States. The decision of the trial court was affirmed by the Arkansas Supreme Court in *Quinn-Moore v. Lambert*, 272 Ark. 324, 614 S.W.2d 230 (1981).

On June 9, 1981, appellants filed a Notice of Appeal to the Supreme Court of the United States. On July 20, 1981, appellants filed a Jurisdictional Statement with the Court asking that the case be fully reviewed and that counsel be granted oral argument.

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees file this Motion to Dismiss on the grounds that the questions presented to the Court are so unsubstantial as not to need further argument.

---

[1] Art. 19, §13, of the Arkansas Constitution provides:

"All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum."

ARGUMENT

V.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. INTRODUCTION

The question before the Court concerns the right of the people of Arkansas to regulate their own economy. The issue in the case is whether a state, pursuant to its police powers, may set a ceiling on the amount of interest which can be charged on contracts entered into within its borders. The matter was before the Court in the early part of this century, and when considered, was resolved in favor of the state. See *Griffith v. Connecticut*, 218 U.S. 563 (1910).

The right of a state to enact laws for the public health, safety, and welfare has been affirmed by the Court many times. However, in reviewing the cases in which the Court unquestionably deferred to the states the right to make policy decisions affecting the public welfare, one decision stands apart from all the rest as supporting the position of the appellees in the instant case. Ironically, that decision involved the validity of an Arkansas law enacted years ago to protect the public from dangerous practices in the railroad industry.

In *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968), reh. denied, 393 U.S. 1045 (1969), the Court was called upon to determine the constitutionality of the Arkansas "full-crew" laws, which specified the minimum number of

employees who must serve as part of a train crew on locomotives operating within the State. Arguments against the validity of the laws centered around the economic and technical developments within the railroad industry since the enactment of the statutes in the early 1900's. Essentially, the railroads argued that the justification for enactment of the safety measures no longer existed. In reversing the decision of the district court which held the statutes to be unconstitutional, the Court said:

> This summary [of the facts], taken from the evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, *and public policy can, under our constitutional system be fixed only by the people acting through elected representatives.* (Emphasis added).

393 U.S. at 138.

In determining that the public policy of the State of Arkansas ought to be given highest priority by courts of law, the Court added:

> In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elective representatives as to the price society should pay to promote safety in the railroad industry.

393 U.S. at 144. Likewise, the Court in the instant case, should not invoke the judicial power to nullify the decision of the people of Arkansas as to the price society should pay for the use of money.

Unquestionably, the people of the State of Arkansas have the power to enact legislation setting out the public policy of the state with regard to usury. See *Griffin v. Connecticut*, 218 U.S. 563 (1910). This being the case, the Court should not sit as a super legislature to evaluate the economic wisdom of the Arkansas law. As stated by the Court below:

> Ultimately the question in this case narrows down not to an issue of constitutional law but to one of public policy: What should be the maximum interest rate in Arkansas? The appellants' extensive testimony can certainly be interpreted to indicate that on balance the present effect of our 10% usury ceiling is not favorable to the state's economy as a whole. There is also testimony to the contrary. We are not called upon, however, to pass judgment upon the wisdom of our usury law. If it is to be changed, it must be done by a popular vote, not by judicial decision.

614 S.W.2d at 233.

Inasmuch as the issue of whether a state may enact laws to protect the public from excessive interest rates has been affirmatively answered by the Court in the past, and since the decision of what should be the maximum rate of interest allowable in a state is a question of public policy, appellees submit that the case at bar is in need of no further argument. Accordingly, the appeal should be dismissed.

B. THE ARKANSAS USURY LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In their zeal to convince the Court that the Arkansas 10% usury law violates the Due Process Clause of the

United States Constitution, appellants cite the Court to 40 cases in support of the proposition that governments may not fix prices arbitrarily and unreasonably low. Jurisdictional Statement at 17-18. However, not one of the cases cited by appellants even suggests that the regulation of interest rates falls within the category of governmental price fixing. On the contrary, the cases relied upon concern the setting of public utility rates and the establishment of minimum price schedules, neither of which is before the Court in the instant case.

With regard to the public utility rate cases, appellants overlook the obvious distinction between public utilities and financial institutions: financial institutions are not required to accommodate all members of the public. As the Court below stated:

> [T]he clear-cut distinction is that a public utility devotes its property to the public service, must serve any and all members of the community without discrimination, and is therefore entitled to a guaranteed but reasonably limited return on its investment. By contrast, the appellants do not devote their property to the public service, are entitled to pick and choose those to whom they will make loans, and are not entitled to a guaranteed return of any kind.

614 S.W.2d at 232.

On the issue of price-fixing, appellants have failed to differentiate between maximum and minimum price limitation statutes. This distinction is important inasmuch as minimum price statutes preclude price cutting by efficient competitors, while maximum ceiling statutes prohibit the exaction of excessive charges to the public. The

Arkansas 10% usury law is a maximum ceiling statute established by the people to prohibit the taking of excessive interest by lenders. As such, the law is a legitimate exercise of the state's police power to protect the public health, safety, and welfare.

Appellants ask the Court to determine that state usury ceilings are subject to judicial review for reasonableness. They state that "the Arkansas usury law limit of 10% set in 1874 . . . cannot conceivably be rationally related to present day conditions." Jurisdictional Statement at 21. However, the Court was not persuaded by arguments of "changed circumstances" in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1958), and likewise should not be impressed by the unusual argument of counsel that present day lenders, like regulated public utilities, are entitled to a guaranteed rate of return on invested capital. In essence, appellants are asking the Court to consider the economic wisdom of the Arkansas usury law in light of today's market place. However, the Court has stated on more than one occasion that such questioning is not the function of the judiciary. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Ferguson v. Skrupa*, 372 U.S. 722 (1963). In *Ferguson*, the Court said:

> We refuse to sit as a 'super legislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the due process clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor or we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is of no concern of ours. The

> Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. (Footnotes omitted).

372 U.S. at 731-732. Similarly, the Arkansas usury law may be economically sound or unsound. However, any change in the law is not for the court to make. Rather, any change must be left to the people.

This Court has recognized that states have broad discretion in enacting economic legislation. *Sproles v. Binford*, 286 U.S. 374 (1932). When the Arkansas usury law was proposed in 1873, interest rates in the state were at about 24% per annum. (T. 2202-2203) In order to limit the price society should have to pay for the use of money, the voters adopted the present constitutional prohibition against usury. According to the testimony presented by appellees' witnesses, the Arkansas law has served Arkansans well. Consequently, the law is reasonably related to the purpose for which it was enacted, and should be viewed by the Court as legitimate exercise of the state's power to enact economic legislation.

The people of the State of Arkansas have chosen to regulate the amount of interest which may be charged on contracts made within the state's borders. Such a determination of public policy has been upheld by this Court in *Griffith v. Connecticut*, 218 U.S. 563 (1910), and by several state courts. See *Cesary v. Second National Bank of North Miami*, 361 S.2d 917 (Fla.1979); *State ex rel Meierhenry v. Spiegel*, 277 N.W.2d 298 (S.D. 1979); *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981). Inasmuch as lending institutions are not regulated utilities, and since the Arkansas usury law does not constitute any identifiable form of price fixing, the Court should have no difficulty in disposing of appellants' due process claim.

C. THE ARKANSAS USURY LAW DOES NOT PLACE AN UNDUE BURDEN UPON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In the event that a state constitutional provision or statute is challenged as being unconstitutional under the Commerce Clause,[2] the responsibility of the Courts is to determine "whether the national interest in the free flow of interstate commerce outweighs the particular state interest involved, such as protecting the public health, safety, or morality." 2c. Antieau *Modern Constitutional Law* §10:20 (1959).

In *Minnesota v. Cloverleaf Creamery Co.*, ___ U.S. ___, 101 S.Ct. 715 (1981), the Court was called upon to determine whether a Minnesota statute banning the retail sale of milk in plastic non-returnable containers was an undue burden on interstate commerce. In concluding that the law was a valid exercise of the state's police power, the Court noted that the statute prohibited all milk retailers from selling their products in plastic containers without regard to whether the sellers were from outside the State. Likewise, the Arkansas usury law is a valid exercise of the state's police power and uniformly applies to all contracts, without regard to the residency of the lender. Inasmuch as it "visits its effects equally upon both interstate and local business," it cannot be challenged as being violative of the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980).

---

2 "The Congress shall have power . . . To regulate commerce . . . among the several states . . . ." U.S. Const., Art. 1, §8, cl. 3.

Assuming *arguendo*, that the state usury law has some impact on interstate commerce, that intrusion alone should not be used to invalidate the regulation. It has long been recognized that, "[i]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945).

The right of states to enact their own usury laws has been incorporated by Congress into the federal regulatory scheme. For example, in the "Omnibus Banking Act," Act of March 31, 1980, Pub. L. No. 96-221, §§501-512, 94 Stat. 1647-1648, codified at 12 U.S.C. §86a, Congress temporarily preempted state usury laws as they apply to mortgage, business, and agricultural loans. However, in recognition of the fact that national uniformity is not required with respect to interest rates, Congress granted to the states the right to opt-out of the usury preemption by a vote of the people. Thus, while appellants complain that the Arkansas usury law burdens interstate commerce, they cannot show any conflicting legislation by Congress which would prohibit the state from enacting a law pursuant to its police power in order to protect its citizens from excessive interest rates.

Appellants argue that the trial court and the Arkansas Supreme Court refused to declare the state's usury law an undue burden on interstate commerce primarily because there was no precedent on the question. Jurisdictional Statement at 23. However, appellants have overlooked three recent state Supreme Court decisions from other jurisdictions directly on point. In *State ex rel Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D. 1979), the South Dakota Supreme Court found South Dakota's regulation of interest rates on revolving charge account agreements was not an

undue burden on interstate commerce. Likewise, the Florida Supreme Court in *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979), upheld that state's regulation of interest rates when it was attacked on Commerce Clause grounds. And finally, in *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981), the Washington Supreme Court declared that Washington's 12% usury law did not impose an undue burden on interstate commerce.

Similarly, state regulation of interest rates has been upheld in federal courts. In *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975), cert. denied, 425 U.S. 943 (1976), a federal court was called upon to determine whether the Pennsylvania usury statute violates the Commerce Clause of the United States Constitution. There the Court said:

> Considering, however, the historical recognition that the State may, despite the burden on interstate commerce, enact varying usury laws and varying contract laws, any judgment that the present proliferation of regulation of consumer credit transactions has burdened commerce unduly must be made by Congress.
>
> * * *
>
> [W]e decline to hold that the burden imposed by Pennsylvania on Aldens' interstate commerce by virtue [of the Pennsylvania statute] is so great that it outweighs the Commonwealth's interest in regulating the rates which its resident consumers may pay for the temporary use of money or the terms on which they may contract for such use.

524 F.2d at 48-49.

The fact that states have traditionally regulated a particular subject matter, *i.e.* usury, is a consideration which must be weighed in favor of local regulation on that subject matter being upheld. See *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). There the Court said:

> The fact that particular phases of an interstate business or activity have long been regulated or taxed by the state has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the State regulatory and tax laws should be declared valid.

322 U.S. at 548-549.

For 136 of the 144 years of the existence of the State of Arkansas, the 10% usury ceiling has been a part of the state's law. Therefore, it can hardly be argued that regulation of interest rates in Arkansas is not a matter of local concern. Consequently, the state may exercise its police power to define usury even though interstate commerce may be affected. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

Absent any Congressional restriction on the right of states to regulate interest rates, the question before the Court is whether the burden imposed on commerce significantly outweighs any local benefits sought to be achieved by the enactment of the state statute. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). While appellants claim that "the state could attempt to prohibit excessive charges by lenders in a [more] rational, less oppressive manner", Jurisdictional Statement at 25, the Court should not superimpose its judgment over that of the people to determine which, if any, alternate method of regulation

exists. *See Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 142 (1968).

At trial, appellants' evidence established only that the Arkansas usury law is one factor, out of many, which may cause a temporary slowdown of the Arkansas economy. (T. 2703) In fact, the transcript reveals that expert witnesses for both parties agreed that a confluence of factors has resulted in the present economic condition of the State of Arkansas. While the state usury law may act to reduce the number of loans made by borrowers during tight money periods, appellees contend that this results in a benefit to the people of the state by reducing the amount of high-cost debt which they are required to assume during the same periods. (T. 2211) In other words, the usury provision accomplishes the very result for which it was intended—protection of Arkansas borrowers from excessive debt due to extremely high interest rates. This is a legitimate state purpose which the people of the State of Arkansas have reaffirmed three times in the last ten years by rejecting any change in the state usury law. This exercise of the state's police powers, to reduce the consumption of high cost debt during periods of high interest rates, helps to ensure that the state's economy will more readily resume a normal growth pattern following a national recession, or even depression. (T. 2221)

Throughout the course of the litigation, appellants have failed to identify the interstate commerce burdened by the Arkansas law. As the Court below noted:

> Apparently the reference [to the burden on interstate commerce] is to the flow of money when it is sent from one state to be lent or invested in another state. Certainly, according to the proof,

> money does leave Arkansas when out-of-state investments are available at a higher rate of interest. One witness testified, for example, that his bank loses investments in certificates of deposit whenever the interest rate elsewhere is more than a fourth of one percent above the Arkansas rate. Even so, that is apparently a natural result whenever one state, although halfway across the continent, offers a better investment opportunity than another. If that is an unconstitutional burden on interstate commerce, then such burdens occur constantly, and all interest restrictions become invalid. Every such argument is self-defeating.

614 S.W.2d at 232-233.

Appellants have not directly questioned whether the State of Arkansas has a legitimate interest in regulating interest rates to protect its citizens. The actual contention raised by them appears to be whether or not the 10% figure is a proper one. The testimony clearly shows that the Arkansas usury law has served its purpose to protect the citizens of this state from exorbitant interest rates. The law has enabled the State to adjust quickly to recessionary period, and to come out of it without expensive long-term, high-interest debt. The State's usury law is a policy decision of its citizens reflecting an economic philosophy which has been approved over and over again at the polls.

Inasmuch as there is no uniform national rule regulating interest rates, and since the Arkansas 10% usury law operates alike upon all whom it affects, appellees ask the Court to dismiss the appeal filed herein, and to affirm the decision of the Arkansas Supreme Court that the State's usury law does not unduly burden interstate commerce.

D. THE ARKANSAS USURY LAW DOES NOT DENY APPELLANTS EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants argue that the Arkansas usury law violates the Equal Protection Clause of the Fourteenth Amendment because of its unequal impact on different borrowers and lenders. However, because the provision does not classify borrowers, lenders, or loans, it is not the type of law which is properly subject to an equal protection challenge. As the Court below stated:

> The 10% usury limit contains no classification of any kind, has a similar effect upon all persons similarly situated, and thus cannot deny equal protection. The appellants merely mention differing remote consequences of the law, such as the small borrowers' inability to obtain a loan from certain banks in Little Rock because those banks cannot profitably lend small amounts. Almost every constitutional provision has indirect consequences that may effect different persons in different ways, *but there is no denial of equal protection unless the constitutional provision itself embodies an unreasonable classification.* (Emphasis added).

614 S.W.2d at 233.

Assuming *arguendo* that the state usury statute does contain some hidden classification, the Court should determine whether those classifications are rationally related to the achievement of the statutory purposes. See *Minnesota v. Cloverleaf Creamery Co.*, ___ U.S. ___, 101

S. Ct. 715 (1981). In the case at bar, the 10% usury law was enacted to protect the people from excessive interest rates. Inasmuch as witnesses for both sides stated that the law worked to prohibit individuals from entering into long-term, high-interest debt, the purpose of the legislation has been satisfied.

Even if the Arkansas law treated some groups of citizens differently than others, the Court has sanctioned many such laws in the area of economic regulation. See *McGowan v. Maryland*, 366 U.S. 420 (1961). In *McGowan*, a case which involved a challenge to the Maryland Sunday closing laws, the court stated:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which effect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. The state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any stated facts reasonably may be conceived to justify it. (Citations omitted). (Emphasis added).

366 U.S. at 425-426.

The Arkansas 10% usury law operates alike upon all whom it affects. There is no constitutional or statutory classification of borrowers, lenders, or loans. As a matter of fact, the only disparity which exists today with regard to the amount of interest which may be charged to citizens of the state for the use of money results from several pieces of

federal legislation which temporarily preempt the Arkansas usury law. (See the *National Bank Act*, 12 U.S.C. §85, and amendments thereto including, but not limited to, Pub. L. No. 93-501, commonly referred to as the "Brock Bill"; Pub. L. No. 96-104, commonly referred to as the "Borrower's Relief Act"; Pub. L. No. 96-221, commonly referred to as the "Omnibus Banking Act").

Inasmuch as there is no classification within the Arkansas usury law, the Court is not required to apply the traditional equal protection rationality test. See *Vance v. Bradley*, 440 U.S. 93 (1979). Such being the case, the Court should have no difficulty in disposing of this final argument of appellants. Accordingly, the Court should dismiss the appeal, and uphold the decision of the State Supreme Court that the Arkansas 10% usury law does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

VI.
CONCLUSION

The Arkansas Constitutional Convention of 1874 framed a constitution which has been the foundation of government in this state for over 100 years. Article 19, §13 of that document is an expression of public policy that all contracts for a greater rate of interest than 10% per annum shall be void. Several attempts have been made over the years to amend this constitutional provision, or to simply do away with it; all of these efforts have failed. Undaunted by the resounding defeats accorded to every attempt to modify or amend the constitutional restriction, opponents of the 10% usury ceiling have taken their cause to the courts seeking to bring about indirectly that which they could not accomplish directly – abolition of the state's right to regulate its own economy.

The Court is being called upon to once again reaffirm the principle that a state may regulate the amount of interest charged by lenders for the use of money loaned within a state's jurisdiction. Appellants argue that such regulation by the State of Arkansas offends the Due Process Clause, the Equal Protection Clause, and the Commerce Clause of the Constitution of the United States. However, inasmuch as such arguments have been recently rejected by several state Supreme Courts, and since this Court many years ago declared that such economic regulation was within the police power of a state, the Court should dismiss the appeal on the ground that the questions

presented are so unsubstantial as not to need further argument.

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, three copies of the foregoing Motion to Dismiss have been served on counsel of record for appellants, Herschel H. Friday, Jr., Esquire, Friday, Eldredge & Clark, 20th Floor, First National Building, Little Rock, AR 72201, by depositing same in the United States Mail, with first-class postage prepaid, on the 20th day of August, 1981. In addition, copies of the Motion to Dismiss have been served upon all other counsel designated by appellants in the Jurisdictional Statement.

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IN THE

Supreme Court Of The United States

NO. 81-131
OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

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ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

THE QUESTIONS ARE SUBSTANTIAL

A.

INTRODUCTION

The motion to dismiss filed by the Attorney General draws into sharp focus the issue before this Court. Basically,

the Attorney General is taking the rather startling position that because a state may enact usury laws under its police power, that the manner and level of that price regulation is *not subject to judicial review and may be totally arbitrary and capricious!* Appellants continue to maintain, on the other hand, that even though a state may determine as a matter of public policy, not subject to judicial review, to have usury laws, when it does so, however, it must establish rates in a rational manner at rational levels, or the usury laws may be successfully challenged as being in violation of the United States Constitution.

B. THE ARKANSAS USURY LAW DEPRIVES APPELLANTS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is no question but that Arkansas and other states may regulate their economy, including charges for the use of money, under their police power. The basic thrust of the Attorney General's motion to dismiss is to justify that a state may so regulate its economy. This argument misses the point. The question is whether a state may *irrationally, arbitrarily* regulate its economy by fixing prices for the use of money at a destructive, prohibitive level which has no rational connection with the purpose of the law, namely to present *excessive* charges for the use of money. The Arkansas law *forbids* borrowing and lending when the national market price for the use of money exceeds 10%.

The Attorney General makes the very erroneous statement that the cases relied upon by appellants concerned only the setting of public utility rates and the

establishment of minimum price schedules, rather than cases involving the setting of maximum prices in non-utility cases. (motion to dismiss, pages 6-8)

Contrary to this analysis of appellants' cases, in their jurisdictional statement appellants cited the following cases not involving railroad or public utilities in which courts struck the particular setting of a *maximum* rate or price as being arbitrary and unconstitutionally low: *United States v. L. Cohen Grocery Company*, 255 U.S. 581 (1922) (maximum price for sugar); *A.B. Small Company v. American Sugar Refining Company*, 267 U S. 233 (1925) (maximum price for sugar); *Gold v. Lorenzo*, 425 F.2d 949 (2nd Cir. 1979) (maximum rate for real estate brokers' fees); *Mora v. Majas*, 223 F.2d 814 (1st. Cir. 1955) (maximum price for rice); *Karrick v. Cantrill*, 277 F. 578 (Ct. App. D.C. 1922) (maximum residential rent rates); *Culberson v. Ashford*, 118 Tex. 491, 18 S.W.2d 585 (1929) (maximum agricultural rent rates); *Berger v. State Board of Hairdressing*, 118 R.I. 55, 371 A.2d 1053 (1977) (maximum fees for hairdressing school); *Alsup v. State*, 178 Ark. 170, 10 S.W.2d 9 (1928) (maximum rate for employment agency).

Moreover, the cases cited by appellants in their jurisdictional statement which did involve railroad and utility rates are precisely in point. As the Court stated *Gold v. Lorenzo*, 425 F.2d 949 (2nd Cir. 1979):

> Gold's attack on the level of the commission seems indistinguishable from claims by railroads and other public utilities that state administrative orders are depriving them of their property without due process of law (425 F.2d 949 at 961)

If there were any different considerations in such cases, those considerations would cause an even stricter

review of interest rate limitations. because a public utility is guaranteed a rate of return. A lender is *not* guaranteed a rate of return, and therefore should not be arbitrarily hampered in his *effort* to make a profit.

Moreover, unlike a public utility or railroad which *must* provide gas, electricity, water, and service to its customers, if a rate is set arbitrarily low against a lender, the borrower will not receive the use of the money at all. A lender cannot be forced to lend in a state with confiscatory usury laws. The adverse impact upon the customers is even the more reason why any price regulation for the use of money must be rational.

The cases cited by the Attorney General also fully support the position of appellants.

The only issue before the Court at the present time is whether the questions presented are substantial enough to warrant plenary consideration. The Attorney General cited case after case in which this Court considered questions only after plenary consideration, with opinions that detailed the many factors that must be considered.

Further, in each of the cases the Court did judicially review the reasonableness of the challenged regulation, where the reasonableness of that regulation was at issue. For example, in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1958) (motion, p. 8) it was only after a very detailed judicial review by this Court of the reasons given by the state to justify the Arkansas full crew law that the law was upheld. Like the present case, the Court pointed out that whether to have a full crew law or not is a matter of public policy, but once such a law is enacted, it will be judicially reviewed for reasonableness.

In none of the cases cited by the Attorney General was any issue raised, as in the present case, regarding the reasonableness of the rates set. In *Ferguson v. Skrupa*, 372 U.S. 722 (1966); *State v. Spiegel*, 277 N.W.2d 298 (S.D. 1979); and *Whitaker v. Spiegel*, 623 P.2d 1147 (Wash. 1981) (motion, pgs 8, 9) there was a challenge to the state's right to forbid debt adjusting except by lawyers and the state's right to have usury laws where interstate commerce is involved. The rates set by the debt adjusters and the rate set by the states for interest was not even questioned.

Likewise, in *Griffith v. Connecticut*, 218 U.S. 563 (1910) and *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979) there was no challenge to the level of interest rates set by the state. Rather, in each case, the challenge was to the classification scheme adopted by the legislature. By contrast with the Arkansas law which contains no classification and attempts to set a flat rate for all times, for all lenders, for all borrowers, for all types of loans, both of these cases support the position of appellants. Both cases demonstrate how legislatures can properly classify in an effort to rationally, rather than arbitrarily regulate interest rates.

Finally, the case of *Sproles v. Binford*, 286 U.S. 374 (1932), (motion, p. 9) upholding the validity of a state statute forbidding truck lengths over fifty-five feet has apparently been overruled by the decision of this Court in *Kassel v. Consolidated Freightways Corporation of Delaware*, ____ U.S. ____, 101 S.Ct. ____, 67 L.Ed. 850 (Decided March 24, 1981).

The Attorney General, then, has totally failed to overcome the showing made in apellants' jurisdictional statement that the due process question indeed is substantial and requires plenary consideration.

C. THE ARKANSAS USURY LAW IS AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

The Attorney General's arguments and cases cited under this heading of his brief likewise totally fail to overcome appellants' position that the question is so substantial as to require plenary consideration.

The first case cited by the Attorney General under this heading, *Minnesota v. Clover Leaf Creamery Co.*, ____ U.S. ____, 101 S.Ct. 715 (1981), (motion, p. 10) is seriously misinterpreted by the Attorney General. He states in his brief that the case stands for the proposition that if a state law "visits its effects equally upon both interstate and local business it cannot be challenged as being violative of Commerce Clause." This Court made no such statement. Rather, in fact, it stated just the opposite. Following is the pertinent portion of this Court's opinion:

> Even if a statute regulates 'even-handedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'

Other cases cited by the Attorney General regarding the Commerce Clause issue fully support the position of appellants because this Court, after carefully weighing the

local interests against the impact on interstate commerce found that the state law *was* an undue burden on interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980); *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), (motion, pgs 10, 11, 13).

The Attorney General further contends that because Congress has not yet entirely preempted all state usury laws, that Congress has blessed the state laws that remain. Appellants do not believe this Court will seriously consider the suggestion that Congress intended by not preempting all state usury laws to have made a determination that any particular state usury law remaining was or was not a rational regulation of interest rates. As pointed out in appellants' jurisdictional statement, pages 22 - 26, there are broad areas where Congress has always left to the states the power to enact *reasonable* laws even though those laws affect interstate commerce. However, where a law is challenged as being an *unreasonable* regulation affecting interstate commerce, Congress has properly deferred to the courts as the proper branch of government to review on a case by case basis the rationality of the law. As Chief Justice Stone made clear in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945):

> But in general *Congress has left it to the courts* to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. . . . (Emphasis added) (325 U.S. 761 at 770)

The Attorney General's citation of the case of *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975) (motion, page 12) is inapplicable for the same reasons given previously for the

reliance on the *Spiegel* cases. *Alden*, like *Spiegel*, challenged *broadside* the right of a state to enact any usury law. The rate was not in question.

Therefore, there is a substantial question that the Arkansas usury law not only is a burden on interstate commerce but completely prohibits the flow of money in interstate commerce in times such as have existed during the past few years. Since there are innumerable rational alternatives for regulating interest rates, the Arkansas usury law cannot pass the required test under the Commerce Clause.

D. THE ARKANSAS USURY LAW DENIES APPELLANTS EQUAL PROTECTION OF THE LAW UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his motion to dismiss, the Attorney General totally ignores the principal case relied upon by appellants in their jurisdictional statement which established beyond any doubt that a law, although applying equally to all on its face, is an unconstitutional denial of equal protection if it *operates* unequally. This principle was reaffirmed by this Court in *Williams v. Illinois*, 399 U.S. 235 (1970) cited at page 27 of appellants' jurisdictional statement. No further citation is needed to establish this point.

The fact that the law does operate unequally on citizens of Arkansas and citizens of other states desiring to borrow or lend in Arkansas is not denied by the Attorney General. Thus the position of appellants that the Arkansas usury law denies them equal protection of the law is also not overcome by the Attorney General's motion.

E.

CONCLUSION

In their jurisdictional statement, appellants demonstrated beyond any doubt the severe economic impact of the irrational Arkansas usury law upon Arkansas citizens and those attempting to do business with Arkansas citizens. The jurisdictional statemen also demonstrated beyond any doubt the substantial nature of the questions presented. The motion to dismiss filed by the Attorney General actually emphasizes the accuracy of appellants original position. This case should, therefore, be scheduled for plenary consideration.

Respectfully submitted,

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